No. 12340

United States
Court of Appeals
For the Ninth Circuit.

BOOTH-KELLEY LUMBER COMPANY, a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellee,

and

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellant,

vs.

BOOTH-KELLEY LUMBER COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeals from the United States District Court, for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

VEAZIE, POWERS & VEAZIE, and

JAMES ARTHUR POWERS,

611 Corbett Building,
Portland, Oregon,

For Appellant.

KOERNER, YOUNG, SWETT & McCOLLOCH,

JAMES C. DEZENDORF,

ALFRED H. CORBETT,

800 Pacific Building,
Portland, Oregon,

For Appellee.

In The District Court of The United States
For The District of Oregon

Civil No. 3989

SOUTHERN PACIFIC COMPANY, a corporation,

Plaintiff,

vs.

THE BOOTH-KELLY LUMBER COMPANY,

Defendant.

COMPLAINT

Comes now plaintiff and for cause of action against defendant alleges:

I.

Plaintiff is a Delaware corporation engaged in the business of a common carrier by railroad in interstate and intrastate commerce in Oregon. Defendant is an Oregon corporation. The amount in controversy exclusive of interest and costs, exceeds the sum of $3000.00.

II.

On or about June 30, 1941, Southern Pacific Company entered into an Industrial Track Agreement with defendant, The Booth-Kelly Lumber Company, covering the maintenance and operation of industrial track facilities serving defendant's Springfield mill, a copy of which agreement is attached hereto, marked Exhibit "A", and by this reference made a part hereof.

III.

In this contract, defendant agreed that, without the prior written consent of Southern Pacific Company, it would not maintain any structure or obstruction of any character upon or over the premises of Southern Pacific Company.

IV.

The agreement also contained the promise of Defendant to indemnify and hold Southern Pacific Company harmless for loss, damage, injury or death for any act or omission of Defendant, its employes or agents, to the person or property of the parties to the agreement and their employes while on or about said track.

V.

On February 8, 1945, Mack D. Powers was employed as brakeman for Southern Pacific Company. He was engaged as part of the crew on one of Southern Pacific Company's trains which was switching over the track covered by said agreement. While so engaged, and while riding on the caboose, Mack D. Powers was injured by being caught between the side of the caboose and a wood cart which had been placed and maintained on the premises of Southern Pacific Company by defendant, its employes or agents, in a position approximately 42 inches from the outside of the outside rail.

VI.

Said employee brought action against Southern Pacific Company for damages for his injuries under

the provisions of the Federal Employer's Liability Act. The complaint alleged breach of Southern Pacific Company's statutory duty of using ordinary care to provide said Mack D. Powers with a reasonably safe place in which to work in that, first, it caused and permitted the wood cart to remain on the track, and second, it failed to warn him of the presence of the wood cart and the resultant insufficient clearance.

VII.

At trial the allegation that Southern Pacific Company caused and permitted the wood cart to remain on the track was removed from the jury's consideration because of lack of evidence. A verdict was returned for said Mack D. Powers upon the second count and judgment was duly entered.

VIII.

Subsequently plaintiff was obliged to pay, and did pay, the sum of $44,699.46 in satisfaction of said judgment. In addition to said amount plaintiff was obligated to pay, and has paid $1869.53 in necessary costs and attorney's fees in defending said action.

IX.

Shortly following the filing of said action against it, plaintiff gave timely Notice and made timely Demand and Tender of Defense upon defendant, a copy of which Notice, Demand and Tender is attached hereto, marked Exhibit "B", and by reference made a part hereof. Defendant denied any

liability and refused to assume the defense of said action. Subsequent to the rendering of the judgment plaintiff made demand upon defendant for the payment of $44,699.46 judgment costs plus $1869.53 additional costs of defending the action, which sums defendant fails and refuses to pay.

Wherefore, plaintiff prays:

1. For judgment against defendant for damages for breach of said contract in the sum of $46,568.99, or

2. For judgment requiring defendant to indemnify and reimburse plaintiff in the sum of $46,568.99, and for its costs and disbursements incurred herein.

KOERNER, YOUNG, SWETT
& McCOLLOCH,
/s/ JAMES C. DEZENDORF,
/s/ ALFRED H. CORBETT,
Attorneys for Plaintiff.

EXHIBIT "A"

(Copy)

Southern Pacific Company—Pacific Lines
Industrial Track Agreement

This Agreement, made this 30th day of June, 1941, by and between Southern Pacific Company, a corporation hereinafter called "Railroad," and Booth-Kelly Lumber Company, a corporation, hereinafter called "Industry",

Exhibit "A"—(Continued)

Recitals:

Industry has requested Railroad to maintain and operate industrial track facilities, hereinafter called "Track," described as follows: Spur track, approximately 2,257 feet in length, at or near Springfield Station, County of Lane, State of Oregon. The location of said Track is shown by dashed red line and by solid red line on the map hereto attached and made a part hereof.

Agreement:

Now, Therefore, in consideration of the agreements hereinafter contained to be kept and performed by the parties hereto, it is mutually agreed that the said Track shall be maintained and operated under the following terms, covenants and conditions:

1. The term "Track" as used herein shall designate the plural number if there is more than one track, and shall include all appurtenances thereof, consisting of rail and fastenings, switches and frogs complete, bumpers, ties, ballast, roadbed, embankment, trestles, culverts and any other structures and things necessary for the support of and entering into the construction of said Track, and if said Track, or any portion thereof, is located in a thoroughfare, said term "Track" shall include pavements, culverts, drainage facilities and all other work required by lawful authority in connection with the construction, renewal, maintenance and operation of said Track.

Exhibit "A"—(Continued)

2. Industry will secure and furnish at its expense all necessary franchises and permits and right of way beyond the premises of Railroad for the construction and maintenance of said Track and for the operation of locomotives, motors, trains and cars thereon and thereover, except in the event that any State or Municipal body from which it is necessary to obtain franchises or permits shall require that the application be made by Railroad, in which event application therefor shall be made by Railroad. In the event Railroad applies for and secures said franchises or permits, Industry expressly agrees to pay any and all expenses incurred by Railroad in obtaining said franchises or permits, and all sums which may be expended at any time or times by Railroad under the provisions of said franchises or permits.

3. All material in said Track furnished at the expense of Railroad and not paid for by Industry, whether in original construction or by way of replacements or repairs, shall be and remain the exclusive property of Railroad. In the event said Track is disconnected, or upon termination of this agreement, Railroad may recover from the land of the Industry all the material owned by Railroad, and Industry, if said Track or any portion thereof is located in a thoroughfare, will pay the cost of removing all material owned by Industry and restoring the thoroughfare in good condition, satisfactory to the proper lawful authority, and Industry, provided no default shall then exist as to any covenants

Exhibit "A"—(Continued)

or or agreements to be kept and performed by Industry, may recover all material owned by Industry and located on land of Railroad; provided, however, Railroad, at its option, may perform at the sole cost and expense of Industry all work of dismantling, taking up and removing said material owned by Industry and placing the ground in its original condition. Notwithstanding anything to the contrary herein contained, Railroad shall have the right at any time to purchase at its then value any or all material in said Track owned by Industry and not located on land of Industry.

4. Railroad agrees to operate said Track and to serve Industry thereon, subject to any lawful charges that may be made by Railroad for such service; said Track shall be under control of Railroad and Railroad shall have the right to use the same when not to the detriment of the Industry.

5. Industry agrees that without the written consent of Railroad first had and obtained, no structure, material, pole, cable, wire, conduit, pipe, opening, excavation or obstruction of any character shall be erected, piled, made, stored or maintained upon or over the premises of Railroad, or beneath any track upon the premises of Railroad. In the event such written consent is given, Industry agrees to comply with the following minimum clearances: Item:

Structures, material, poles or other obstructions of any character, except as shown below:

Exhibit "A"—(Continued)

Clearance:

A minimum side clearance of six (6) feet measured horizontally from outside of nearest track rail.

Item:

Platforms in excess of four (4) feet in height measured vertically from top of nearest track rail:
Clearance:

A minimum side clearance of six (6) feet measured horizontally from outside of nearest track rail.

Item:

Platforms four (4) feet or less in height measured vertically from top of nearest track rail:
Clearance:

A minimum side clearance of four (4) feet nine (9) inches measured horizontally from outside of nearest track rail.

Item:

Structures over or across any track and for a distance of at least six (6) feet from the outside of the rails thereof:
Clearance:

A minimum overhead clearance of twenty-two (22) feet measured vertically above tops of rails.

Item:

Wires over or across any track and for a distance of at least six (6) feet from the outside of the rails thereof:

Exhibit "A"—(Continued)

Clearance:

A minimum overhead clearance of twenty-five (25) feet measured vertically above tops of rails.

The above side clearances are for straight track. Along and adjacent to and for one car length beyond all portions of curved track, a side clearance of one foot greater than the minimum side clearance prescribed for straight track shall be maintained.

If, however, by statute or order of competent public authority greater clearances than those specified in this section shall be required, Industry expressly agrees to strictly comply with such statute or order.

All doors, windows or gates shall be of the sliding type, or shall open toward the inside of the building or enclosure when such building or enclosure is so located that said doors, windows or gates if opening outward would when opened, impair the clearances in this section provided.

Industry also agrees to comply with all the provisions of this section with respect to clearances on the property beyond the premises of Railroad, and that no pipe, conduit, structure, opening or excavation of any kind whatsoever, shall be made or placed beneath any track, or within ten (10) feet thereof, beyond the premises of Railroad without first giving Railroad written notice thereof.

6. Industry agrees that under no circumstances shall any gunpowder, dynamite or other explosive

Exhibit "A"—(Continued)

material be piled or stored by Industry or others upon the premises of Railroad.

In the event said Track is used by Industry for the loading or unloading of oils, gasoline, other inflammable liquids or liquified petroleum gases, Industry agrees to observe Railroad's Rules governing the location of new loading and new unloading points for Casinghead gasoline, Refinery gasoline, Naphtha, Inflammable Liquids or Liquified petroleum gases, and Practice Rules for the protection of oil sidings or spurs where inflammable Liquids or Liquified petroleum gases are loaded or unloaded from danger due to stray electrical currents and static electricity. A copy of said Rules will be furnished by Railroad to Industry upon request of Industry, and Industry agrees to be bound by and carry out each and every provision set forth in said Rules.

7. It is understood that the movement of railroad locomotives involves some risk of fire, and Industry assumes all responsibility for and agrees to indemnify Railroad against loss or damage to property of Industry or to property upon its premises, regardless of Railroad's negligence, arising from fire caused by locomotives operated by Railroad on said Track, or in its vicinity, for the purpose of serving said Industry, except to the premises of Railroad and to rolling stock belonging to Railroad or to others, and to shipments in the course of transportation.

Industry also agrees to indemnify and hold harm-

Exhibit "A"—(Continued)

less Railroad for loss, damage, injury or death from any act or omission of Industry, its employes or agents, to the person or property of the parties hereto and their employes, and to the person or property of any other person or corporation, while on or about said Track; and if any claim or liability, other than from fire, shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally.

8. Railroad may rearrange or reconstruct the Track or modify the elevation thereof whenever necessary or desirable in connection with the improvement of its property or changes in its tracks at or near the location of said Track, provided that the Industry shall continue to have similar trackage, without additional cost to the Industry. In the event, however, that a rearrangement or reconstruction of the Track, or modification of the elevation thereof, is required by reason of or as a result of any law, ordinance or other public enactment or regulation, or by reason of the happening of any contingency over which the Railroad has no control, then the Industry shall bear the cost of such rearrangement, reconstruction or modification. Nothing in this section contained shall in any way affect the right of the Railroad to terminate this agreement under the conditions hereinafter set forth.

9. Railroad shall have the right to disconnect the said Track or refuse to operate over the same,

Exhibit "A"—(Continued)

and in either case this agreement at the option of Railroad shall terminate, in the event that (a) Industry shall cease to do business on said Track in an active and substantial way for a continuous period of one (1) year, unless prevented from so doing by law, strikes or any causes beyond the control of the Industry; (b) Industry shall fail to observe and perform each and every of the covenants and promises herein contained which are by Industry to be observed and performed, or (c) Railroad is required or authorized by law, ordinance or police regulations, or orders of any lawfully constituted public authority having jurisdiction in the premises, to discontinue operation of said Track, or to change its tracks in such manner as to render it impracticable, in the judgment of Railroad, to continue to operate said Track.

10. This agreement is not to be construed as extending, altering, amending, modifying or forming a part of any instrument in writing between the parties hereto, or their predecessors or successors in interest, with respect to the use by Industry, or its successors in interest, of any premises of Railroad or its lessor.

11. It is understood and agreed that Sections 12 to 21, inclusive, hereof, on insert hereto attached, are hereby made parts of this agreement.

This agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

Exhibit "A"—(Continued)

In Witness Whereof, the parties hereto have executed this agreement in duplicate the day and year first hereinabove written.

Recommended

J. W. CORBETT
Superintendent
SOUTHERN PACIFIC
COMPANY

[Seal] By L. B. McDONALD
General Manager

Attest:

ROY G. HILLEBRAND
Asst. Secretary
BOOTH-KELLY LUMBER
COMPANY [Seal]
By CHAS. G. BRIGGS
President

Attest:

N. A. DUNBAR
Secretary

Description Correct

H. A. HAMPTON

Form Approved:

A. E. STEWART
Contract Attorneys

Witnessed By:

F. C. CRAWFORD
EMMA N. DRAIN

Form of Execution Approved.

E. C. CROCKER

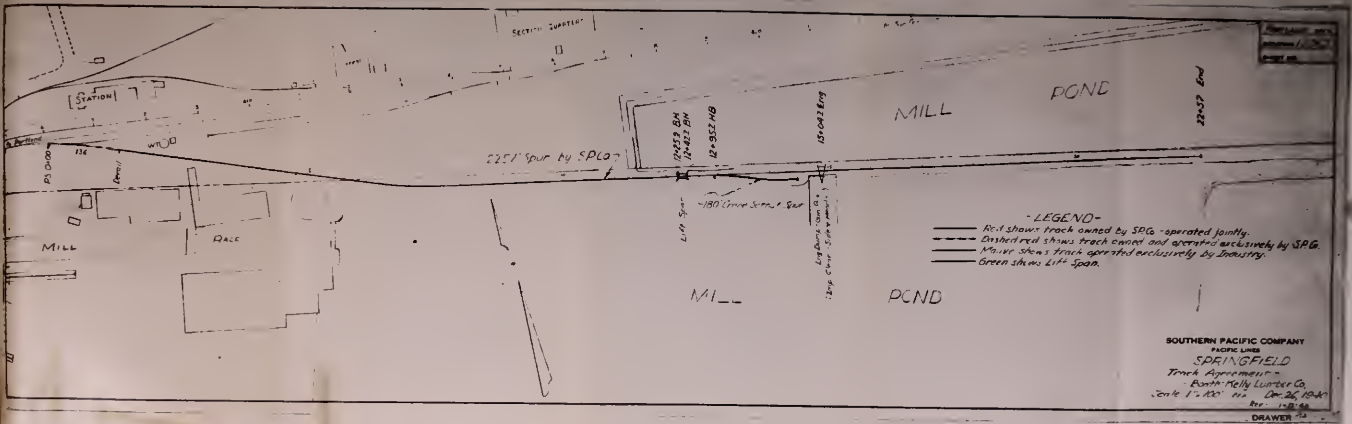
SECTION QUARTERS
STATION
WT
PS 0+00
136
Derail
2251' Spur by SP.Co
12+253 BH
12+423 BH
12+952 HB
15+042 Eng
22+57 End
MILL
POND
Lift Span
180' Crane Set-out Spur
MILL
RACE
MILL
POND
- LEGEND -
Red shows track owned by SP.Co - operated jointly.
Dashed red shows track owned and operated exclusively by S.P.Co.
Mauve shows track operated exclusively by Industry.
Green shows Lift Span.
SOUTHERN PACIFIC COMPANY
PACIFIC LINES
SPRINGFIELD
Track Agreement -
- Booth-Kelly Lumber Co.
Scale 1" = 100'
Dec. 26, 1940
DRAWER

Exhibit "A"—(Continued)

Copy

Insert

12. Under dates of January 4, 1909 and February 27, 1909 the parties hereto entered into certain agreements relating to the construction, maintenance and operation of industrial trackage at said Springfield, which trackage is now located as shown by dashed red line and by solid red line on said map and is hereinafter referred to as said "Track". In the construction of said Track Railroad paid for and furnished all metal required therein and Industry paid for the ties, grading, ballast and labor.

13. Railroad at its own expense shall maintain said Track, except that Industry, to the satisfaction of Railroad and at Industry's expense, shall maintain the subgrade therefor and shall continue to maintain a certain lift span trestle therein (as more specifically provided in that certain supplemental agreement between the parties hereto dated August 14, 1940), and any other trestles or structures supporting said Track.

14. The provisions of Section 5 of this agreement shall not apply to any clearances in violation thereof existing as of the date hereof, i.e., two (2) brow skids and an overhead unloading device; provided, however, that Industry shall release and discharge and agree to indemnify and save harmless Railroad from and against any and all loss, damage, injury, death, cost, expense and liability

Exhibit "A"—(Continued)

of every kind and nature resulting directly or indirectly from the existence of said impaired clearances. It is expressly agreed that this agreement shall not be construed as authorizing Industry to maintain any impaired clearances along or over said Track except those specifically referred to above.

15. Notwithstanding the provisions of Section 4 hereof, Railroad shall not be required to place cars loaded with logs at any specified point on said Track for unloading, but all incoming cars loaded with logs shall be delivered by Railroad to Industry on the portion of said Track in the general vicinity of the track shown by mauve line on said map and marked "180′ Crane Setout Spur." Industry agrees to accept delivery of said cars of logs at the point of delivery as defined in this Section 15, and such cars and their contents shall be considered in the custody of Industry from the time the same are placed by Railroad on said Track until switched therefrom by Railroad.

16. Industry shall have the right to move cars on the portion of said Track shown by solid red line by means of a cable attached to a traveling crane; also to move a traveling crane upon such portion of Track; provided, however, no car or crane shall be moved by Industry at such time or times as Railroad is operating or about to operate on said Track, or in such manner as to interfere with, delay or endanger switching operations of Railroad.

Exhibit "A"—(Continued)

17. Industry agrees to return to Railroad all cars delivered to Industry by Railroad in as good condition as when received, ordinary wear and tear excepted. In the event any of said cars are not so returned by Industry to Railroad in as good condition as when delivered to Industry, ordinary wear and tear excepted, Railroad is hereby requested to make necessary repairs to said cars at the expense of Industry, which expense shall be paid to Railroad by Industry on demand, and should any of said cars delivered by Railroad to Industry be destroyed, or for any reason not returned to Railroad, Industry agrees to pay to Railroad the value of said cars, said value to be determined by Railroad; provided, however, Industry shall not be liable for any loss or destruction of or damage to cars caused by the negligence of Railroad, except as herein otherwise provided.

18. In addition to but not in qualification of the provisions of Sections 7 and 17 hereof, Industry hereby releases and discharges and agrees to indemnify and save harmless Railroad, its agents, successors and assigns, from all liability resulting directly or indirectly from the movement of cars and/or operations by Industry upon said Track.

19. The track shown by mauve line on said map is owned and shall be maintained by Industry, and Railroad shall not be obligated to move any cars thereon.

20. Said agreements of January 4, 1909 and

Exhibit "A"—(Continued)

February 27, 1909 are hereby terminated as of the date hereof.

21. Notwithstanding the foregoing, that certain supplemental agreement between the parties hereto dated August 14, 1940 shall continue in full force and effect during the life of this agreement in the same manner and to the same extent as if this agreement were specifically referred to in Section 7 thereof.

EXHIBIT "B"

To Booth-Kelly Lumber Company, a corporation:

Notice, Demand and Tender

You are hereby notified that on February 8, 1945, at approximately 1:15 p.m. of said day, Mack D. Powers, an employee of Southern Pacific Company, was engaged in switching cars on the spur track on your premises near Sprinfield Station, County of Lane, State of Oregon. In the course of his employment, he was on or about a railroad car moving along said spur track and was injured by coming into contact with a wood cart which had been left standing near said spur track by you. Southern Pacific Company operated on said spur track, in performance of its duties as a common carrier by railroad for hire.

Heretofore, and on October 2, 1945, said Mack D. Powers, as plaintiff, commenced an action in the Superior Court of the State of California in

and for the City and County of San Francisco against Southern Pacific Company as defendant which said action is entitled and numbered as follows: "Mack D. Powers, plaintiff, vs. Southern Pacific Company, a corporation, defendant," Number 344915. Enlargement of the time for defendant to appear to December 15, 1945 has been obtained. In said action he makes claim against Southern Pacific Company for damages on account of his said injuries, and alleges in substance and effect, that said injuries were proximately caused by the presence of a loaded wood cart so close to the said spur track as to allow insufficient clearance for his body between the wood cart and the caboose. For further particulars of said claim, reference is made to the complaint to the action.

On June 30, 1941, you entered into a contract in writing with the Southern Pacific Company, a corporation. Said contract has been in full force and effect ever since.

It is the position of Southern Pacific Company that the claim of said Mack D. Powers is not chargeable in whole or in part against it; that Southern Pacific Company is not chargeable in whole or in part for liability involved in such claim; and that the injuries and damages of said George S. Price were due to the acts and/or omissions of Booth-Kelly Lumber Company, its officers, agents, servants and employees, and were due to breach of said contract of June 30, 1941 by Booth-Kelly Lumber Company, in leaving said wood cart

in such close proximity to the said spur track as not to allow sufficient clearance, in permitting said wood cart to remain in such position, and in failing to notify Southern Pacific Company and its officers, agents, servants and employees, including said Mack D. Powers, of the presence of said wood cart, as hereinabove described, all without the consent of Southern Pacific Company, and that negligence on the part of Booth-Kelly Lumber Company was active, and any negligence on the part of Southern Pacific Company, if any, was remote and passive only.

It is further the position of Southern Pacific Company that the injuries and damages of said Mack D. Powers were due to the violation and breach by you of the terms, covenants and conditions of said contract of June 30, 1941.

You are required to and demand is hereby made upon you, to indemnify and save harmless Southern Pacific Company and its successors and assigns from and against any and all claims, liability, judgment or judgments, costs, attorneys' fees and expenses of whatever nature, resulting from or by reason of the injuries to said Mack D. Powers and the matters hereinabove referred to. To this end you are hereby notified and required to appear in said action and make defense thereto on account and for Southern Pacific Company, and the defense of said action on behalf of Southern Pacific Company is hereby tendered to you.

In the event you decline said demand and decline

such tender, Southern Pacific Company, not waiving its rights and claims aforesaid, makes further demand upon you that you appear in said action and make defense with Southern Pacific Company jointly, and bear equally with Southern Pacific Company any and all claims, liability, judgment or judgments, costs, attorneys' fees and expenses of whatever nature resulting from or by reason of injuries to said Mack D. Powers and the matters hereinabove referred to.

In any event, demand is hereby made upon you to perform the terms, covenants and conditions of said agreement of June 30, 1941 on your part to be performed.

Will you be kind enough to notify us what action you propose to take. You may notify us by advising our attorney in said action, Arthur B. Dunne, Esq., Room 611, 333 Montgomery Street, San Francisco, California, Telephone Yukon 1977. In the event you undertake the defense of said action on behalf of Southern Pacific Company and agree to indemnify Southern Pacific Company as specified above and so advise Mr. Dunne, such attorneys as you may select will be given appropriate substitutions and the undersigned and its attorneys will cooperate with you and your attorneys in the preparation of said case for trial, and furnish such information as the undersigned has.

Without restricting any of the foregoing and for the purpose of advice to you in the premises, we hereby advise you that one of the positions of

the undersigned is that the wood cart hereinabove referred to, and the cart referred to in the complaint in said action Number 344915 was placed and left by you in the position in which it was at the time of the above referred to accident, in violation of the said agreement of June 30, 1941 and that Southern Pacific Company asserts and will assert all such rights as it has under said agreement and all such rights as it may have irrespective of said agreement.

SOUTHERN PACIFIC COMPANY

By D. J. RUSSELL
Vice President

[Endorsed]: Filed Dec. 19, 1947.

[Title of District Court and Cause.]

ANSWER

Comes now defendant and for its Answer to plaintiff's Complaint, admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs I and II of plaintiff's Complaint.

II.

Answering Paragraph V of plaintiff's Complaint, defendant admits that on February 8, 1945, Mack D. Powers was injured while acting in the employ

of plaintiff and riding on a caboose being operated by plaintiff on the spur track referred to in the agreement alleged in Paragraph II of plaintiff's Complaint.

III.

Answering Paragraphs VI and VII of plaintiff's Complaint, defendant admits that Mack D. Powers brought an action against plaintiff for damages which he received as a result of the negligence of plaintiff and that he recovered judgment against the plaintiff in said action.

IV.

Answering Paragraph VIII of plaintiff's Complaint, defendant denies that plaintiff has paid any of the sums herein and demands proof thereof.

V.

Denies each and every allegation as set forth in plaintiff's Complaint excepting such allegations as hereinbefore admitted and excepting such allegations as may be specifically admitted, stated, or qualified in defendant's further and separate and Affirmative Answers and Defenses, which said Affirmative Answers are made a part hereof for the purpose of this denial the same as fully set forth.

First Affirmative Answer and Defense

Comes now the defendant and for its first separate and affirmative answer and defense, alleges:

I.

That on or about June 30, 1941 plaintiff and defendant entered into and executed an industrial track agreement prepared by plaintiff covering the maintenance and operation of industrial track facilities serving defendant's Springfield mill, a copy of which agreement is attached to plaintiff's Complaint, marked Exhibit "A" and by this reference is made a part hereof for the purpose of this defense the same as though fully set forth.

II.

That plaintiff had knowledge of the presence of the wood cart referred to in Paragraph V of plaintiff's Complaint for a period of at least four (4) days prior to February 8, 1945, when Mack D. Powers backed out of the caboose of plaintiff and was carried on said caboose against said wood cart and received certain injuries.

III.

That plaintiff failed to notify defendant, its employees or agents to move said wood cart and failed to inform defendant of the presence of said wood cart at the place where the above accident occurred.

IV.

That plaintiff waived any violation of said industrial track agreement with respect to the position of the wood cart.

Second Affirmative Answer and Defense

Comes now the defendant and for its second separate and affirmative answer and defense, alleges:

I.

Realleges the allegations contained in Paragraphs I, II and III of its first affirmative answer and defense and by reference incorporates the same herein the same as though fully set forth.

II.

That plaintiff continued to operate its trains over said spur track after receiving notice of the presence of said wood cart at the place where this accident occurred and assumed the risk of any injury which resulted from the presence of the wood cart near said spur track.

Third Affirmative Answer and Defense

Comes now the defendant and for its third separate and affirmative answer and defense, alleges:

I.

Realleges the allegations contained in Paragraph I of its first affirmative answer and defense and by reference incorporates the same herein the same as though fully set forth.

II.

That on February 8, 1945 Mack D. Powers, while acting in the course of his employment as a brakeman for plaintiff, detrained from a caboose being

operated by plaintiff and was carried by plaintiff into and against a wood cart adjacent to said spur track and receive certain personal injuries.

III.

That thereafter the said Mack D. Powers brought an action against plaintiff in the Superior Court of the State of California, In and For the City and County of San Francisco, entitled, "Mack D. Powers, plaintiff vs. Southern Pacific Company, a corporation, defendant, #344-915" to recover for said injuries based upon allegations that negligence of plaintiff was the proximate cause of said injuries.

IV.

That said action came on for trial and resulted in a verdict in favor of said Mack D. Powers and judgment was duly entered in favor of said Mack D. Powers and against Southern Pacific Company.

V.

That defendant is a corporation organized under the laws of the State of Oregon and is duly authorized to engage in the lumber business.

VI.

That said agreement, insofar as it purports to bind and make defendant liable as an indemnitor for the negligence of plaintiff as the indemnitee, is illegal and void and contrary to public policy.

Fourth Affirmative Answer and Defense

Comes now the defendant and for its fourth separate and affirmative answer and defense, alleges:

I.

Realleges the allegations contained in Paragraphs I, II, III, IV and V of its third affirmative answer and defense and by reference incorporates the same herein the same as though fully set forth.

II.

That the liability of plaintiff to the said Mack D. Powers was based solely upon the master-servant relation existing between those parties and the duty of plaintiff to exercise due care with respect to said Mack D. Powers, and the liability was not related to and did not arise out of any contractual relation between plaintiff and defendant under said industrial track agreement.

III.

That there was no consideration for any promise by defendant to idemnify plaintiff for liability or damage not related to or arising out of or dependent upon the contractual relation between plaintiff and defendant under said industrial track agreement.

Fifth Affirmative Answer and Defense

Comes now the defendant and for its fifth separate and affirmative answer and defense, alleges:

I.

Realleges the allegations contained in Paragraph I of its first affirmative answer and defense and by reference incorporates the same herein the same as though fully set forth.

II.

That at all times hereinafter mentioned plaintiff was a corporation organized under the laws of the State of Kentucky and doing business in the State of Oregon and other states and was engaged in the business of common carrier by railroad in interstate commerce.

III.

That on the 8th day of February, 1945 at about the hour of 1:15 o'clock p.m., Mack D. Powers was engaged in the employ of plaintiff as a brakeman and was acting in the course of said employment on a train being operated by plaintiff on said spur track.

IV.

That at said time and place, Mack D. Powers in detraining from a caboose being operated on said spur track by plaintiff, was carried into and against a wood cart located adjacent to the track, as the result of which accident said Mack D. Powers received certain injuries.

V.

That at said time and place plaintiff was negligent in that:

(a) It failed to warn Mack D. Powers of the presence of said wood cart.

(b) It failed to furnish Mack D. Powers with a safe place in which to work in that he was required to demount from a side door caboose rather than a rear door caboose.

(c) It failed to properly indoctrinate Mack D. Powers in the proper manner of detraining from a side door caboose.

(d) It failed to remove said wood cart or cause other persons to remove same.

VI.

That the aforesaid negligence of plaintiff was the sole proximate cause of and contributed to the proximate cause of the injuries to Mack D. Powers.

VII.

Realleges the allegations contained in Paragraphs III and IV of its third affirmative answer and defense and by reference incorporates the same herein the same as though fully set forth.

Sixth Affirmative Answer and Defense

Comes now the defendant and for its sixth separate and affirmative answer and defense, alleges:

I.

Realleges the allegations contained in Paragraphs I, II, III and IV of its fifth affirmative answer and defense and by reference incorporates the same herein the same as though fully set forth.

II.

That at said time and place, Mack D. Powers was negligent in that:

(a) He failed to keep a proper lookout.

(b) He backed out of caboose without ascertaining that such move could be made safely.

(c) He attempted to detrain in the proximity of said wood cart.

(d) He backed out of caboose while the train was moving and before it had safely passed said wood cart.

(e) He failed to report the presence of said wood cart adjacent to the track to plaintiff or defendant.

III.

That said negligence contributed to and was a proximate cause of the injuries received by Mack D. Powers.

Wherefore, defendant prays that plaintiff take nothing by its Complaint and that the defendant have judgment against plaintiff for its costs and disbursements herein.

GRIFFITH, PECK,
PHILLIPS & NELSON,

By /s/ JAMES K. BUELL,
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed Jan. 31, 1948.

[Title of District Court and Cause.]

Civil No. 3989

PRE-TRIAL ORDER

The above entitled action came on regularly for pre-trial conference before the undersigned judge of the above entitled Court on Tuesday, November 9, 1948. The plaintiff appeared by and through Alfred H. Corbett, one of its attorneys. The defendant appeared by and through James A. Powers and James K. Buell, its attorneys. Counsel, with the approval of the Court agreed to the following:

Admitted Facts

I.

At all times mentioned herein, plaintiff was a corporation domiciled in and organized under laws of the State of Kentucky. On or about September 1, 1947, plaintiff was re-organized as a Delaware Corporation, and removed its domicile to said last named state, and ever since said date has been, and is now a corporation organized under the laws of Delaware. At all times herein mentioned, the plaintiff was, and is engaged as a common carrier by railroad in interstate and intrastate commerce in Oregon. The defendant is an Oregon corporation. The amount in controversy exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000).

II.

On or about June 30, 1941, the plaintiff entered into an Industrial Track Agreement with defendant, covering the maintenance and operation of industrial track facilities serving defendant's Springfield Mill on premises used or owned by defendant, which agreement is marked pre-trial Exhibit 1.

III.

On February 8, 1945, when said agreement was still in effect, Mack D. Powers was engaged as brakeman for plaintiff as part of the crew of one of plaintiff's trains which was switching over the industrial track covered by said agreement, delivering cars. The train was under the general direction of a conductor. While so engaged, and while detraining from the caboose, Mack D. Powers was injured by being caught between the side of the caboose and a wood cart which was the property of defendant and had been placed and left by the defendant, its employees or agents alongside said track in such a position that one corner of the cart was 42″ from the outside edge of the outside rail of said track.

IV.

Said employee brought action against Southern Pacific Company for damages for his injuries under the provisions of the Federal Employer's Liability Act. The complaint alleged breach of Southern Pacific Company's statutory duty of using ordinary care to provide said Mack D. Powers with a reason-

ably safe place in which to work in that, first, it caused and permitted the wood cart to remain on the track, and second, it failed to warn him of the presence of the wood cart and the resultant insufficient clearance.

At trial the allegation that Southern Pacific Company placed the wood cart on the track was removed from the jury's consideration because of lack of evidence. A verdict was returned for said Mack D. Powers.

The records of said proceeding, consisting of pleadings, transcript of proceedings at trial, verdict and judgment are marked pre-trial Exhibits 2a to 2g, both inclusive.

V.

Shortly after the filing of said action against it by Mack D. Powers, and before time for answer, plaintiff gave notice and made demand and tender of defense upon defendant, which Notice, Demand and Tender is marked pre-trial Exhibit 3. Defendant denied any liability arising out of said accident and refused to assume the defense to said action.

VI.

Subsequent to the rendering of the judgment against it, after agreement with defendant that such settlement should be without prejudice to its contention that defendant was obligated to pay the amount of said judgment, and plaintiff's costs and similarly without prejudice to any contentions on the part of defendant that it was not obligated to

pay anything by reason of said accident or judgment, plaintiff compromised said judgment by the payment to Mack D. Powers of the sum of $44,-699.46. Satisfaction of judgment showing payment of said sum is marked pre-trial Exhibit 4.

VII.

In addition to said sum, which plaintiff paid Mack D. Powers, plaintiff was obligated to pay, and has paid One Thousand Eight Hundred Sixty-nine Dollars and Fifty-three Cents ($1,869.53) for costs and attorneys' fees in defending said action of Mack D. Powers.

VIII.

Subsequent to the payment of said sums, plaintiff made demand upon defendant for the payment thereof, which sums defendant failed and refused, and still refuses to pay.

IX.

It is agreed that both parties to this action are bound by the proceedings and judgment in the action, Mack D. Powers v. Southern Pacific Company as to all matters there determined.

Contentions of the Parties

A.

Plaintiff contends defendant breached said Industrial Track Agreement by placing and leaving its wood cart within 42″ from the track; that as the natural or necessary result of defendant's said

breach of contract plaintiff was damaged in the sum of $46,568.99; and that plaintiff is entitled to receive said sum from defendant as damages for breach of contract.

With respect to plaintiff's A,

Defendant admits that one of its wood carts was left within a distance of 42 inches from the nearest rail of the said track, but denies that this constitutes a breach of said agreement which would impose liability on this defendant for the loss plaintiff sustained for the reasons:

(1) That under said agreement plaintiff railroad was given full control over the said track and said plaintiff railroad had the right to regulate all trains and the right to have any obstructions removed which interfered with the railroad's operations and which in the railroad's judgment were deemed hazardous or dangerous.

(2) That the wood cart was in the same place it was in when the accident occurred approximately from January 30 to and including February 8, the date of the accident, and this with the full knowledge, consent and approval of the plaintiff railroad company who, acting through its agents and employees and men operating its trains, was fully aware of the condition as it existed, and plaintiff was in the best position to know of any hazard or danger created by the cart, but nevertheless continued to operate and run its trains with full knowl-

edge that said wood cart was standing at said distance from the track.

(3) Defendant denies that there was any breach of said track agreement, but if there was a breach there was a waiver thereof by the plaintiff railroad company through its continued operation of its trains with full knowledge of existing conditions, and moreover such breach, if any, was not the cause of plaintiff's loss and the agreement does not cover and was not intended to cover a loss resulting through plaintiff's own negligence nor to allow plaintiff railroad company to recover for a loss which it sustained through its own negligence.

(4) The agreement referred to is one of several entered into by the parties covering the same track, and it should be considered together with the earlier agreements in order to show the entire transaction; that there is no consideration for the additional obligations contained in the agreement of June 30, 1941, under which plaintiff seeks to recover herein.

(5) A custom was developed by the parties under the track agreement to the effect that the railroad would notify the defendant whenever there was any obstruction of the track clearance and defendant would remove same, and the railroad having failed to follow the customary practice is estopped by its conduct from asserting that the alleged breach caused the loss.

(6) A breach, if any, as to clearances under the track agreement would not in any event give rise

to a cause of action for any damages resulting therefrom, since paragraph (9) of the agreement expressly provides that railroad shall have a right to discontinue service in that event.

(7) Defendant contends that even if there has been a breach of clearances under the contract, and even if plaintiff would ordinarily be entitled to damages resulting from such a breach, it is not in this case for the reason that the breach was discovered by plaintiff prior to damage and therefore such damage was not caused by the claimed breach.

(8) That plaintiff would not be entitled to recover costs and attorneys fees incurred in California action under a breach of the contract theory.

(9) That the railroad company failed to put a sign in the converted caboose warning trainmen of the danger descending therefrom in a backward manner without first looking to see that the way was clear.

Plaintiff denies the foregoing.

B.

As an alternative to A, plaintiff contends that it has been obligated to pay $46,568.99 by reason of injury to one of its employees occasioned by an act or omission of defendant while the employee was on or about the industrial track, and that under the Industrial Track Agreement defendant is obligated to indemnify and hold harmless the plaintiff in that amount.

With respect to plaintiff's contention B, defendant contends:

(1) That the payment made by the plaintiff railroad company did not result from an act or omission of the defendant but was the result of plaintiff's own act or omission as established and adjudicated in the California action in which it was held that an act or omission of plaintiff's caused the injuries to its employee or that the combined act or omission of the plaintiff and its employee Mack D. Powers caused his injuries with the resultant loss to plaintiff railroad. The plaintiff is not entitled to recover from the defendant under said industrial track agreement for a loss sustained through its own act or omission, or through its act or omission combined with that of another.

(2) No consideration for the agreement to indemnify and hold harmless; that the same was obtained after the spur track and agreement was in operation and without any consideration therefor moving to defendant.

(3) To uphold plaintiff's contention would permit plaintiff as a common carrier to enforce indirectly a contract, which under the circumstances here is void as against public policy.

(4) Defendant contends that plaintiff's liability to Powers did not arise out of the track agreement but rather out of the master-servant relationship between itself and Powers and under the Federal-

Employers Liability Act and that therefore the indemnity provision of the track agreement would not cover this liability.

(5) Defendant contends that extension of the indemnity agreement to cover subject case would be contrary to public policy and void in that plaintiff would be thereby enabled to escape liability for a breach of its non-delegable duty under the Federal Employers Liability Act.

(6) Defendant contends that plaintiff had an affirmative duty under the track agreement to exercise due care in the operation of its trains over subject track and that its breach of said duty is a breach of a condition of the agreement which forfeits right of plaintiff to require performance of the indemnity provision of the agreement by defendant.

(7) Defendant also reasserts its contentions hereunder that were made under plaintiff's contention "A".

Plaintiff denies the foregoing.

C.

As an alternative to A and B, plaintiff contends that defendant is obligated to pay plaintiff $46,568.99 since defendant's negligence was the active or primary cause of the injury to plaintiff's employee, Mack D. Powers.

With respect to plaintiff's contention C, defendant contends:

(1) Defendant denies that it is in any way obligated to pay plaintiff railroad company the sum claimed, and defendant contends that plaintiff is estopped by the judgment in the California action from asserting that the loss that plaintiff sustained resulted from anything other than its own negligence which proximately caused the accident and injuries. It was established in that action that it was plaintiff's own negligence in operating its train under conditions fully known to it which was the immediate proximate cause of the accident and injuries.

(2) Defendant contends that plaintiff is not entitled to enforce contribution from an alleged joint tort feasor.

(3) That if it should become an issue under any of plaintiff's contentions as to whether plaintiff's negligence caused the loss and injury to Mack D. Powers or whether plaintiff's negligence was a contributing cause of said injuries and loss, defendant then contends that the railroad was negligent in the following particulars:

(a) In operating its train knowing of the impaired clearance and particularly with knowledge that it was using a converted box car for a caboose which was so constructed it required a person descending from the caboose or box car to the ground to do so in a backward movement.

(b) In using a converted box car for a caboose which was so constructed as to require a person

descending from the caboose to do so in a backward manner and in such manner that a person descending could not see where he was going or what his body might strike.

(c) In failing to observe the rules and regulations with respect to operating trains and particularly with respect to causing any obstructions which impaired clearances to be removed.

(d) In operating its train with full knowledge that there was an impaired clearance which created a hazard or danger for the trainment.

(e) In failing to furnish its employees a safe place to work.

(f) In failing to notify defendant to remove the obstruction.

(g) In operating its train knowing of the hazardous condition and in failing to warn employees thereof, and particularly Mack D. Powers.

(h) That the railroad was aware of the dangerous and hazardous condition which being known to it, the railroad had a last clear chance of avoiding the accident and it was negligent in failing to stop the train which it had an opportunity to do before an accident occurred to require said obstruction to be removed.

(i) That the agent and employee of the defendant, Mack D. Powers was then and there negligent in failing to look before he attempted to descend

from the train and in riding on the train in the switching operations, in failing to see the alleged obstruction, in failing to comply with the rules and regulations of the railroad company, and in placing himself in a dangerous position when a safe position was open to him.

(4) Defendant further contends that plaintiff's negligence was established in the California trial between Mack D. Powers and the plaintiff and that the proximate cause of the accident and injuries was established in said action as being the negligence of the Southern Pacific Company and not the negligence of this defendant, and this defendant's negligence, if any, was a remote cause and not an immediate proximate cause; that the matter is now res adjudicata.

Plaintiff denies the foregoing, and further contends that if it is determined that plaintiff was guilty of negligence which proximately caused the injury to Mack D. Powers, and if it is determined that plaintiff is not otherwise entitled to recover the full amount of $46,568.99, defendant was likewise guilty of negligence which was a joint or concurring cause of the damage to Powers and resulting liability of plaintiff, and under the agreement defendant must, in any event, assume one-half the cost and must pay plaintiff $23,284.49.

Issues of Fact

1. Was the damage to Powers and liability of plaintiff the natural or necessary result of defend-

ant's breach of contract? If so, in what amount?

2. Was plaintiff damaged by reason of an act or omission of defendant, its agents or employees to an employee of plaintiff while on or about the industrial track? If so, in what amount?

3. Was defendant negligent in placing and leaving the wood cart within 42″ from the track? If so, was defendant's negligence in this regard the active or primary cause of the injury to plaintiff's employee, Powers?

4. Did the damage to plaintiff's employee arise from the joint or concurring negligence of plaintiff and defendant?

5. Was it established in the California trial and proceedings that the plaintiff through violation of the Federal Employers Liability Act was negligent and that its negligence proximately caused the injuries to Powers and the resulting loss?

6. Is the matter of the railroad company's negligence as determined in the California proceedings and trial res adjudicata? If not, was the railroad company negligent in any of the particulars specified in defendant's contentions?

7. Was the negligence of Booth-Kelly, if any, remote?

8. Was there any consideration for the indemnity provision contained in the track agreement?

9. Is plaintiff barred from recovering under the track agreement by reason of its own acts and conduct?

10. Was there a custom and practice between the parties under which plaintiff would give notice to defendant of any objectionable obstruction to track clearance, and a further custom of defendant's removing same at the request of railroad?

11. Did plaintiff discover the alleged breach prior to the accident and if so was the loss and damage caused by plaintiff's conduct in continuing operations without taking steps to have the cart removed or to warn its employees thereof?

Issues of Law

A. Was the placing and leaving of the wood cart within 42″ from the track a breach of contract by defendant?

B. Is plaintiff entitled to be indemnified by defendant under the industrial track agreement in the sum of $46,568.99 or any part thereof?

C. Is defendant obligated plaintiff $46,568.99 or any part thereof independent of the agreement?

D. Can an employer under the Federal Employers Liability Act delegate the duties imposed upon him by said Act?

E. Is the negligence imposed upon an employer for violation of the Federal Employers Lia-

bility Act resulting in injuries to an employee considered to be primary negligence?

F. Can a railroad operating as a common carrier contract to be held harmless against its own negligence or is such contract void as against public policy.

G. Whose control was the track under and did the track area include the point and place where the cart was located?

H. Did the railroad have the right to have any obstructions removed which railroad deemed hazardous?

I. Was there a waiver of any breach if one existed?

Exhibits

The following exhibits were received and marked as pre-trial exhibits, the parties agreeing that no further identification or authentication is necessary. All objections are waived as to Pre-trial Exhibits, 1, 2a to 2g, both inclusive, 3, 4, 5, 6 and 7. In the event any or all the other exhibits are offered in evidence at the time of trial, said exhibits are to be subject to objection only upon the grounds of materiality, competency or relevancy:

Plaintiff's Exhibit 1.—Industrial track agreement dated June 30, 1941.

Plaintiff's Exhibit 2a.—Copy or complaint, Mack D. Powers against Southern Pacific Company.

Plaintiff's Exhibit 2b.—Copy of answer, Powers v. Southern Pacific Company.

Plaintiff's Exhibit 2c.—Transcript, Powers v. Southern Pacific Company, January 28, 1947.

Plaintiff's Exhibit 2d.—Transcript, Powers v. Southern Pacific Company, January 29 and 30, 1947.

Plaintiff's Exhibit 2e. — Transcript, Powers v. Southern Pacific Company, January 31, 1947.

Plaintiff's Exhibit 2f.—Copy of verdict, Powers v. Southern Pacific Company.

Plaintiff's Exhibit 2g.—Copy of judgment on verdict, Powers v. Southern Pacific Company.

Plaintiff's Exhibit 3.—Notice, Demand and Tender.

Plaintiff's Exhibit 4.—Satisfaction of judgment, Powers v. Southern Pacific Company.

Plaintiff's Exhibit 5.—Picture of cart taken shortly after accident, looking west.

Plaintiff's Exhibit 6.—Picture of cart taken shortly after accident, looking east.

Plaintiff's Exhibit 7.—Picture of caboose taken shortly after accident.

Defendant's Exhibit 8.—Spur track agreement dated 1902.

Defendant's Exhibit 9.—Spur track agreement dated 1-4-1909.

Defendant's Exhibit 10.—Spur track agreement dated 2-27-1909.

Defendant's Exhibit 11.—Spur track agreement dated 8-14-1940.

Defendant's Exhibit 12.—Spur track agreement dated 8-15-1940.

Defendant's Exhibit 14.—Copy General Safety Rules of Southern Pacific Company.

Defendant's Exhibit 15.—Copy Rules & Regulations for the maintenance of Way & Structures of Southern Pacific Company #4621.

Defendant's Exhibit 16.—Letter from plaintiff to defendant, June 6, 1940.

Defendant's Exhibit 17.—Letter from plaintiff to defendant, February 5, 1940.

Defendant's Exhibit 18.—Picture of side door caboose taken February 12, 1945.

The foregoing is a Pre-trial Order agreed upon at a conference between counsel and the Court. It shall not be amended at the trial except by consent or to prevent manifest injustice. It is ordered that this Pre-trial Order supersedes the pleadings which now pass out of the picture.

No demand for jury trial was made by either party.

The foregoing Pre-trial Order is hereby approved and entered this 11th day of November, 1948.

/s/ JAMES ALGER FEE,
Judge.

Order Approved:

/s/ ALFRED H. CORBETT,
Of Attorneys for Plaintiff,

/s/ JAMES ARTHUR POWERS,
Of Attorneys for Defendant.

[Endorsed]: Filed Nov. 11, 1948.

In the United States District Court
for the District of Oregon

Civil No. 3989

SOUTHERN PACIFIC COMPANY,
a Corporation,
Plaintiff,

vs.

BOOTH-KELLEY LUMBER COMPANY,
a Corporation,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial in the above entitled court on November 11, 1948, plaintiff appearing by Alfred H. Corbett, one

of its attorneys, and defendant appearing by James Arthur Powers, one of its attorneys, and witnesses having been sworn and evidence submitted, and the court having considered the various issues of law and of fact now makes the following:

Findings of Fact

1. Plaintiff is a Delaware corporation. Previous to September 1, 1947, when plaintiff was reorganized, plaintiff was a corporation domiciled in and organized under the laws of the State of Kentucky, and at all times pertinent to this case, was engaged as a common carrier by railroad in interstate and intrastate commerce in Oregon. Defendant is an Oregon corporation. The amount in controversy exclusive of interest and costs, exceeds the sum of $3,000.00.

2. On or about June 30, 1941, plaintiff entered into an industrial track agreement with defendant, covering the maintenance and operation of industrial track facilities serving defendant's Springfield mill on premises used or owned by defendant.

3. On February 8, 1945, when agreement was still in effect, Mack D. Powers was engaged as brakeman for plaintiff as part of the crew of one of plaintiff's trains which was switching over the industrial track covered by said agreement, delivering cars. The train was under the general direction of a conductor. While so engaged, and while detraining from the caboose, Mack D. Powers was injured by being caught between the side of the

caboose and a wood cart which was the property of defendant and had been placed and left by the defendant, its employees or agents alongside said track in such a position that one corner of the cart was 42 inches from the outside edge of the outside rail of said track.

4. Said employee brought action against Southern Pacific Company for damages for his injuries under the provision of the Federal Employers Liability Act. The complaint alleged breach of Southern Pacific Company's statutory duty of using ordinary care to provide said Mack D. Powers with a reasonably safe place in which to work in that, first, it caused and permitted the wood cart to remain on the track, and second, it failed to warn him of the presence of the wood cart and the resultant insufficient clearance.

At trial the allegation that Southern Pacific Company placed the wood cart on the track was removed from the jury's consideration because of lack of evidence. A verdict was returned for Mack D. Powers.

5. Shortly after the filing of said action against it by Mack D. Powers, and before time for answer, plaintiff gave notice and made timely demand and tender of defense upon defendant. Defendant denied any liability arising out of said accident and refused to assume the defense to said action.

6. Subsequent to the rendering of the judgment against it, after agreeing with defendant that such

settlement should be without prejudice to its contention that defendant was obligated to pay the amount of said judgment, and plaintiff's costs and similarly without prejudice to any contentions on the part of defendant that it was not obligated to pay anything by reason of said accident or judgment, plaintiff compromised said judgment by the payment to Mack D. Powers the sum of $44,699.46.

7. In addition to said sum plaintiff was obligated to pay and has paid $1,869.53 for costs and attorneys' fees in defending said action of Mack D. Powers.

8. Subsequent to the payment of said sums, plaintiff made demand upon defendant for the payment thereof which sums defendant refused to pay.

9. Defendant was negligent in placing and leaving the wood cart within 42 inches from the spur track.

10. Defendant's negligence in this regard was the active, direct, proximate and primary cause of the injury to plaintiff's employee Powers.

11. Powers suffered injuries in the amount of $44,000.00.

12. Plaintiff suffered loss in the amount of $44,-699.46 judgment costs and of $1,869.53 court costs and attorneys' fees, by reason of an act or omission of defendant, its agents or employees to an employee of plaintiff while on the industrial track.

13. The damage to Powers and the liability of

plaintiff was the natural or necessary result of defendant's breach of contract.

14. Some elements of negligence on the part of plaintiff concurred to cause the accident.

15. Plaintiff was not negligent in the form of the specifications of negligence made by defendant in the pre-trial order.

16. There was consideration for the indemnity provisions of the spur track agreement.

17. Employees of plaintiff observed the position of the cart and operations continued thereafter prior to the accident.

18. The loss and damage to Powers were not proximately caused by the conditions mentioned in the previous findings.

19. There was no custom or practice between the parties under which plaintiff would give notice to defendant of any objectionable obstruction to track clearance or of defendant moving the same at the request of the plaintiff.

20. This case involves different parties and different issues than were presented in the action of Mack D. Powers against plaintiff.

21. The placing and leaving of the wood cart within 42 inches from the track was a breach of the provisions of said agreement relating to impaired clearances.

Based on the foregoing finds of fact the court hereby makes and enters the following:

Conclusions of Law

1. The industrial spur track agreement is a valid contract.

2. The determinations in the Mack D. Powers' action against plaintiff are not res adjudicata in this proceeding.

3. Plaintiff did not waive defendant's breach of contract.

4. The matter of control over the spur track has no material bearing upon the determination of this case.

5. Defendant is not obligated to pay plaintiff $44,568.99, or any part thereof, independent of the industrial spur track agreement.

6. Plaintiff had the right under the industrial track agreement to have any obstructions removed which it deemed hazardous.

7. Plaintiff is entitled to recover judgment against defendant for the sum of $22,000.00 on the contract, together with its costs and disbursements incurred herein.

Dated this 22nd day of June, 1949, at Portland, Oregon.

/s/ JAMES ALGER FEE,
Judge.

Service of copy acknowledged.

[Endorsed]: Filed June 22, 1949.

In the United States District Court
for the District of Oregon

Civil No. 3989

SOUTHERN PACIFIC COMPANY,
a Corporation,

Plaintiff,

vs.

BOOTH-KELLEY LUMBER COMPANY,
a Corporation,

Defendant.

JUDGMENT ORDER

The above entitled action having come on for trial on the Pre-trial Order and proofs of the respective parties, and having been argued by counsel for the parties, and the court after deliberation having heretofore signed and entered findings of fact and conclusions of law, it is now

Ordered and Adjudged that plaintiff have and recover judgment against defendant in the sum of $22,000.00 and for its costs and disbursements herein incurred taxed at $27.64, and that execution issue therefor.

Dated at Portland this 22nd day of June, 1949.

/s/ JAMES ALGER FEE,
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed June 22, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Booth-Kelley Lumber Company, a corporation, the above-named defendant, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and the whole thereof, entered in this action on the 22nd day of June, 1949, and which judgment is now final.

By /s/ JAMES ARTHUR POWERS, of
VEAZIE, POWERS & VEAZIE,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed July 22, 1949.

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

Notice is hereby given that Southern Pacific Company, plaintiff above named, cross-appeals to the Court of Appeals for the Ninth Circuit from so much of the judgment entered in this action on June 22, 1949, as disallows $24,568.99 of plaintiff's claim.

KOERNER, YOUNG, SWETT &
McCOLLOCH,
JAMES C. DEZENDORF,
ALFRED H. CORBETT,
Attorneys for Cross-Appellant.

Service of copy acknowledged.

[Endorsed]: Filed July 22, 1949.

United States District Court
District of Oregon

Civil No. 3989

SOUTHERN PACIFIC COMPANY,
a Corporation,

Plaintiff,

vs.

BOOTH-KELLY LUMBER COMPANY,
a Corporation,

Defendant.

Before: Honorable James Alger Fee,
Judge.

Appearances:

ALFRED H. CORBETT,
KOERNER, YOUNG, SWETT & McCOLLOCH,
of Attorneys for Plaintiff.

JAMES ARTHUR POWERS,
VEAZIE, POWERS & VEAZIE,
of Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS

Mr. Corbett: We are agreed upon a pre-trial order, your Honor. There is just one matter. We have crossed out several words by way of changes that were made. Defendant's Exhibit No. 13 was

reserved for a map. Could that be entirely eliminated, if there is no Exhibit No. 13, or does that show the exhibit number?

The Court: No, just strike it out.

Mr. Corbett: Strike it out entirely?

The Court: Yes.

(Proposed Pre-Trial Order handed to the Court.)

The Court: The pre-trial order is signed and entered.

Mr. Corbett: If the Court please, this case is a case brought by the Southern Pacific Company to recover over against the Booth-Kelly Lumber Company the amount necessary to satisfy a judgment and the amount paid as attorney's fees and costs for a judgment against Southern Pacific Company by Mack D. Powers, one of the Southern Pacific Company's employees.

Mack D. Powers was injured while working on an industrial spur track serving defendant's mill. The track was on premises used or owned by the defendant.

The evidence will show in this case, or will tend to show, that the accident happened February 8, 1945. Mr. Powers was the rear brakeman of a crew on Southern Pacific's work extra 3904. That train was serving the Springfield area. After several switching movements, which are not important

here, the crew undertook to deliver five cars of logs on this industrial spur serving the defendant.

I am informed this morning by opposing counsel that the logs were not delivered to the defendant, Booth-Kelly Lumber [2*] Company. However, they were delivered over this spur track which is covered by the agreement. The position of the car in question will be shown, if the Court would look at the map which is attached to Pre-Trial Exhibit No. 1, and which I understand may be offered in evidence following this statement, if that is agreeable to Counsel——

Mr. Powers: Yes.

Mr. Corbett: The spur track in question takes off near the station to the west and runs down a distance of approximately 2200 feet.

On the day in question, after the switching operations, the train was pushing five log cars to spot them up in the vicinity of the crane setout spur. The engine was headed east. Ahead of the engine was the caboose and these five cars were ahead of the caboose.

The train pushed the cars down and spotted them in approximately the middle of the spur track. Then the engine and caboose were going to proceed back, and near the west end of the spur,—that is, near its commencement,—they were to cut off the caboose and leave the caboose in position while the engine switched and did some other work.

After spotting the cars the engine and caboose

*** Page numbering appearing at top of page of original Reporter's Transcript.**

proceeded back towards the west end of the track and at a point between 350 and 400 feet from the westerly end of the spur, Mack D. Powers was detraining from the side-door caboose and [3] he was struck by a wood cart, a loaded wood cart, which was the property of the defendant, and which had been placed and left by the defendant for its servants in such position that one corner of the cart was forty-two inches from the outside edge of the outside rail of the track. The caboose overhang was a little over two feet, so there was only approximately fourteen inches, I believe, clearance—about sixteen inches clearance.

Mack D. Powers was seriously injured and subsequently he brought an action against the Southern Pacific Company, alleging that the Southern Pacific Company violated its statutory duty of providing him with a reasonably safe place in which to work. He brought the action in two counts. The first count was that the Southern Pacific Company, or its employees, negligently caused the wood cart to remain on the track; the second count alleged that the Southern Pacific Company or its employees failed to warn him of the presence of the wood cart and resulting insufficient clearance.

I believe the evidence in this case will show, your Honor, that at the trial of Mack D. Powers' case the trial court removed the first count from the consideration of the jury. A verdict was returned for Mack D. Powers, I believe, on the second count; that is, that the Southern Pacific Company failed

to warn Powers of the presence of the wood cart and the insufficient clearance. [4]

After judgment and after a stipulation between the parties that the settlement should be without prejudice to either party, the action was settled for $44,699.40. The Southern Pacific Company incurred costs and attorney's fees in defending the Powers' action of $1,869.53, making a total of $46,568.99.

The Southern Pacific Company has brought this action in three alternative counts, under any one of which we claim the Southern Pacific Company is entitled to receive the full amount, $46,568.99.

The first count is based upon the industrial track agreement, in that defendant breached the industrial track agreement by placing and leaving its wood cart to within forty-two inches of the track and that, as a necessary or natural result of the breach, the Southern Pacific Company was damaged in that sum. This count concerns Paragraph 5 of the industrial track agreement.

The second count is that the plaintiff has been obligated to pay $46,568.99 by reason of the injury to one of its employees occasioned by an act or omission of defendant while the employee was on or about the industrial track, and that under the industrial track agreement defendant is obligated to indemnify and hold harmless the plaintiff in that amount, the plaintiff, Southern Pacific Company. That count concerns Paragraph 7 and Paragraph 18. [5]

As the third alternative count, we contend the de-

fendant is obligated to pay the plaintiff $46,568.99 since defendant's negligence was the active or primary cause of the injury to plaintiff's employee, Mack D. Powers. It is our feeling, your Honor, that upon the industrial track agreement and the proceedings in the Powers case, we are entitled to recover on one of these three theories; that any other evidence is not necessary and we are, as set out in the pre-trial order, bound by whatever is shown in that case.

Our rights are based upon the fact that we have been held liable to an employee at a time when we were operating over that track and we must stand on that liability and on the facts of that case to recover over against the Booth-Kelly Lumber Company.

It has been agreed in the pre-trial order that all objections are waived as to Pre-Trial Exhibits No. 1, No. 2a to No. 2g, both inclusive; No. 3, No. 4, No. 5, No. 6 and No. 7, and at this time I offer in evidence Plaintiff's Exhibit No. 1, the industrial track agreement dated June 30, 1941; Plaintiff's Exhibit No. 2a, copy of the complaint in the case of Mack D. Powers v. Southern Pacific Company; Exhibit No. 2b, copy of answer, Powers v. Southern Pacific Company; Plaintiff's Exhibit No. 2c, transcript, the first volume of the transcript in Powers v. Southern Pacific Company, January 28, 1947; Plaintiff's Exhibit No. 2d, transcript, Powers v. Southern Pacific Company, [6] January 29 and 30, 1947; Exhibit No. 2e, transcript, Powers v. South-

ern Pacific Company, January 31, 1947, which is the Charge of the Court; Exhibit No. 2f, copy of verdict, Powers v. Southern Pacific Company; Exhibit No. 2g, copy of Judgment on Verdict, Powers v. Southern Pacific Company; Plaintiff's Exhibit No. 3, Notice, Demand and Tender; Plaintiff's Exhibit No. 4, Satisfaction of Judgment, Powers v. Southern Pacific Company; Plaintiff's Exhibit No. 5, picture of cart taken shortly after the accident, looking west, towards the commencement of this spur track; Plaintiff's Exhibit No. 6, picture of cart taken shortly after the accident, looking east along the spur track; and Plaintiff's Exhibit No. 7, picture of the side-door caboose which also was taken shortly after the accident.

Mr. Powers: We have no objection to the introduction of any of the exhibits.

The Court: Admitted. They may be marked later.

Plaintiff's Exhibits

(The following Plaintiff's Pre-Trial Exhibits were thereupon received in evidence and marked as follows:)

Exhibit No. 1—Industrial Track Agreement, dated June 30, 1941.

Exhibit No. 2a—Copy of Complaint, Mack D. Powers v. Southern Pacific Company.

Exhibit No. 2b—Copy of Answer, Powers v. Southern Pacific Company. [7]

Exhibit No. 2c—Transcript, Powers v. Southern Pacific Company, January 28, 1947.

Exhibit No. 2d—Transcript, Powers v. Southern Pacific Company, January 29 and 30, 1947.

Exhibit No. 2e—Transcript, Powers v. Southern Pacific Company, January 31, 1947.

Exhibit No. 2f—Copy of Verdict, Powers v. Southern Pacific Company.

Exhibit No. 2g—Copy of Judgment on Verdict, Powers v. Southern Pacific Company.

Exhibit No. 3—Notice, Demand and Tender.

Exhibit No. 4—Satisfaction of Judgment, Powers v. Southern Pacific Company.

Exhibit No. 5—Picture of cart taken shortly after accident, looking west.

Exhibit No. 6—Picture of cart taken shortly after accident, looking east.

Exhibit No. 7—Picture of caboose taken shortly after accident.

Mr. Corbett: The plaintiff rests, your Honor. [8]

Defendant's Motion For Nonsuit

Mr. Powers: The defendant will move for a nonsuit, your Honor, at this time, based upon the proposition that from the exhibits received in evidence, on No. 2c, No. 2d and No. 2e which together make up the transcript of the proceedings in the

trial of the case of Powers against Southern Pacific Company in the California court, and the judgment entered thereon as it appears from the record here, and in so far as that record decided matters present in this action, it appears, your Honor, that the primary negligence was found to be on the Southern Pacific Company; it appears that the case was submitted to the jury and all the testimony there was concerning the negligent acts of the Southern Pacific Company, and it appears from the rules and regulations for maintenance, and the safety rules, and with particular reference to obstructions and impaired track clearance, there is a duty on the part of the railroad; and, further, it appears that the action was brought under the Federal Employers Liability Act and that the jury found, under instructions of the Court, specifically that negligence of the Southern Pacific Company proximately caused the injury complained of; and judgment was entered on the basis that the Southern Pacific's negligence was the proximate cause of the injury, or the Southern Pacific's negligence combined with the negligence of the injured man, proximately caused the accident, and a specific instruction was given to the jury to the effect that the injured man could [9] not recover from the Southern Pacific Company in the event that the jury would find that the negligence of the defendant here, the Booth-Kelly Lumber Company, was the sole proximate cause of the accident or a contributing proximate

cause of the accident, together with that of the injured man himself.

The case was submitted to the jury on two grounds, that the Southern Pacific Company had violated the provisions of the Federal Employers Liability Act, in that they were obligated to furnish employees with a safe place in which to work, and the evidence there showed, and it does show, that the railroad company had knowledge of the cart being in the place that it was in at the time that Powers was struck; it shows that Powers, while attempting to descend from the converted boxcar being used as a caboose, in a backward manner, was required, under the evidence shown, to get out of the boxcar, used as a caboose, in a backward manner and, in doing so, while the train was going at a speed of five miles an hour, this accident occurred.

The evidence shows, too, that this switching operation in which Powers was a brakeman had been going on while the cart was in that same location, for a period of from January 30th until February 8th, when the accident occurred. That was the longest time given by any witness, and the other testimony indicates that one of the men had seen it there for three or four days. The evidence will show from the transcript of testimony that on the day this accident occurred, and before the accident occurred, while this switching operation was in progress [10] that the fireman on this train on the engine, told the engineer about this cart and said, "You can't get by it. You are blocked," and the

engineer, according to the testimony, said, "Well, I got by it before and I know I can clear it."

The evidence further shows in the California case that there were either five or six gondolas or flat-cars loaded with logs. The engine was on one end of the train and the caboose next to the engine and the logs beyond the caboose. As this switching operation started into the premises referred to here, the loads of logs went first. Powers was on the first car of logs. The logs were shunted to a location or spotted near the pond. There was another brakeman standing on top of the caboose as it came along and I think another brakeman on the front of the engine. There was the engineer, of course, operating the train and there was the fireman who called out to the engineer about this obstruction that he could not get by. The conductor testified, now, as I recall it, that the impaired clearance was there.

After the logs had been spotted, five or six cars, they were left there and Powers then got into the caboose which was next to the engine. The engine then was in the process of pulling back to the main line to leave the premises or leave this siding.

With the caboose next to the engine, the engine and caboose were proceeding at the rate of about five miles an hour. [11] Powers then proceeded to get out of the caboose by backing out, and then is when the accident occurred.

The rules of the Southern Pacific were in evidence and they are specific on the point that when there is an impaired clearance the trainmen must

take immediate steps to remove the obstruction; if they cannot handle it locally, they are to notify, by wire if necessary, immediately, the station agent or the railroad master. Actually, at the time this accident occurred, the conductor had left the train, knowing that an impaired clearance was there, and was down at the station. No one gave any notice to the Booth-Kelly Lumber Company to move this cart, and the evidence shows, your Honor, that the cart we are speaking of was a wood cart, mounted, I believe, on iron wheels, and it was used for picking up kindling at the sawmill, short lengths of kindling used to start fires and so forth. There is no evidence that anyone in authority knew the cart was in position, as far as the Booth-Kelly Lumber Company was concerned. It is admitted here it was put or placed there by an employee of the Booth-Kelly Lumber Company, however, so we submit under those facts and under the law and under the agreement we are entitled to a nonsuit now.

I call your Honor's attention to the case of Layman v. Southern Pacific, 173 Ore. 275, and also to the case of Reimers v. Glens Falls, 176 Ore. 47.

In that latter case I call your Honor's particular attention [12] to the part of the decision which says or stands for the proposition that a violation of the Employers' Liability Act of Oregon constituted the primary negligence in the case. Here, the Southern Pacific Company was held liable by reason of the violation of the Employers' Liability Act

and, under the law, you can't delegate that duty; the employer cannot escape that duty.

Under the Layman case our situation is much more favorable to the defendant, so I believe, than was present in the Layman case, for the reason that the indemnity provision in the Layman case was contained in an agreement in the nature of a license by which the railroad was to get no benefit whatever. They permitted a farmer to cross over their tracks and, in agreeing to let the farmer cross over their tracks, they put in the agreement a provision that the farmer would hold the railroad harmless and indemnify the railroad from loss arising from whatsoever nature, as I recall the language. It was a very broad provision.

That differs from our case here where there was a benefit to the railroad, under this spur track agreement. The railroad, in the first place, was getting the freight, as is shown by the agreement. The railroad, in the second place, reserved and had the right, the contractual right to use this track, this particular spur track, for its own trackage. It could use this track for hauling or delivering logs to others; [13] it could use this track for hauling their freight, freight not belonging to Booth-Kelly Lumber Company; it could use this track for its own purposes, and so on, so that we have a much stronger position here than in that other case.

The Supreme Court in the Layman case did not hold, as I read the decision, that a contract by a common carrier or a contract which was designed

to hold a common carrier harmless would be void as against public policy. The Court indicates very strongly in that case that it is of that opinion and it discusses the case of Cacey v. Virginian Railway Company, Fourth Circuit, in considering a contract of this nature, a railroad contract, where there was no benefit given to the railroad, where they held that the railroad could enforce it, even though the railroad itself was negligent. Our Supreme Court adopted, as near as I can read the decision, the vigorous dissenting opinion by Judge Parker, who thought that the indemnity agreement did not cover personal injuries proximately caused by the railroad company's negligence. In the case of Glens Falls Indemnity Company v. Reimers, the Portland General Electric Company entered into a contract with Reimers and Jolivette. The contract covered some work on a building located on Southwest Second and Jefferson Street where there is a substation. The work called for in the contract was "for a complete Gunite job." In other words, they were putting some kind of material on the exterior of a building; just what, it does not appear from the decision, [14] but I assume they were shooting it on with some kind of a gun—cement, stucco or something of that nature. At any rate, it was called the "Gunite" process.

Under that contract the contractors agreed to hold the Portland General Electric Company harmless from all liability for personal injury, and from costs, charges or expense reasonably incurred by the

company on account of such damages, injury or claims which the PGE might sustain by anyone being injured on the job.

An employee of the contractor, while on the job and about his work, came in contact with an electric wire of strong voltage. He was up around the second or third floor of the building; I believe it was the second floor. As a result of that he received some injuries and the injured workman brought an action against the Portland General Electric Company under the Employers' Liability Act of the State of Oregon. The plaintiff recovered judgment and the Supreme Court, upon appeal, affirmed the judgment. That is where they say that violation of that act is primary negligence.

So, we submit to your Honor that it now appears in this case that the Southern Pacific Company has been found negligent under the FELA and under the instructions of the Court.

That case was submitted to the jury on the basis that if the Southern Pacific Company was negligent and also if Powers [15] was negligent he, of course, should still recover, so they either found the Southern Pacific Company's negligence was the sole proximate cause or the combined negligent acts of the Southern Pacific and of the injured man was the proximate cause, and, negligence being established and that being the negligence of the Southern Pacific, we believe we are entitled to a nonsuit. I am speaking now about the first cause of action, the first count, the first contention.

They come in and introduce a new idea. Instead of bringing their action upon the indemnity provision, they allege a breach and they say as a result of that breach, the necessary and natural result of that breach was this loss that they had. We submit that they cannot recover under the law for any breach of the contract where there is negligence causing that loss. We further submit that they could not recover for the breach, because it certainly is not in this contract that the intention of the parties is clearly manifest that the company would be entitled to indemnity for its own negligence. We submit, your Honor, under their first count, that certainly is applicable here. Furthermore, if they were allowed to recover under this first count, it would enable them to recover for their own negligence, and we think such a contract would be void as against public policy.

As pointed out by the Supreme Court of Oregon in the Reimers decision, a majority of American courts hold an indemnity [16] agreement, indemnifying against the negligence of a common carrier, would be void as against public policy.

I wish to cite Johnson v. Richmond & D.R.R. Co., 11 S.E. 829-830, also Cacey v. Virginian Railway, decided in 1936, 85 Fed. (2d) 976-978, the dissenting opinion there being adopted by the Oregon Supreme Court, the dissenting opinion by Judge Parker.

There is a later case on that same point, Louisville & N.R. Co. v. Atlantic Co., 19 S.E. (2d) 364,

decided in 1942, a Georgia case. The point appears at Pages 370 and 371, where it is held the contract will not be construed to cover loss to the indemnitee because of its own negligence unless such intention is expressed in clear and unequivocal terms.

Southern Pacific Company against Layman; Perry v. Payne, 66 Atl. 553, Page 557; North American Railway Construction Co. v. Cincinnati Traction Co., Seventh Circuit, 172 Fed. 204; and Houston & T.C.R. Co. v. Diamond Press Brick Co., 188 S.W. 32, the point being at Page 33.

In connection with the breach they refer, your Honor, to Paragraph 5 of the contract, and, in that connection, I call your attention to the fact that that paragraph is ambiguous. The fact is that this is a spur track agreement prepared by the Southern Pacific Company; it is their own language.

I call your attention to the fact that in Paragraph 5 there is this language that they are relying on: "Industry [17] agrees that without written consent of railroad first had and obtained, no structure, material, pole, cable, wire, conduit, pipe, opening, excavation or obstruction of any character, shall be erected, piled, made, stored or maintained upon or over the premises of railroad, or beneath any track upon the premises of railroad. In the event such written consent is given, industry agrees to comply with the following minimum clearances."

In that regard, your Honor, I call your attention to the fact that no obstruction shall be maintained upon or over the premises of the railroad. What

are the premises of the railroad under this agreement? The contract itself defines the term "track." I will summarize that by saying that it covers the rails, ties, switches and frogs and whatever goes in connection with that.

Therefore, "premises" would be the track and "track," as near as we can figure out, would mean to the edge of the ties. We contend there was nothing maintained on the premises of the railroad. We maintained nothing there. This cart that they have referred to, and as it appears from the record, was something on wheels that could be moved like an automobile or anything else. It does not show any breach of any of the provisions of the contract. I think you would need the written consent of the railroad if you were going onto their track to build some structure or maintain something. If you were going to do that, then you are going to be out on the track and then you must [18] apply for and get written consent, and if you apply for and get written consent, you agree that the minimum side clearance is six feet.

With respect to their second count, it reads, in effect—and appears in the bottom half of Paragraph 7,—that industry, the defendant here, would hold harmless and indemnify the railroad against any loss arising out of personal injury to its employees from an act or omission of the Booth-Kelly Lumber Company. There is nothing said in there about negligence, primary, secondary or any other kind; but if an injury occurs or results from

an act or omission of Booth-Kelly Lumber Company, then they say they are entitled to be indemnified, and here in the California case we have a direct holding that this loss occurred through an act or omission of the railroad; there was an actual omission by the railroad and, under this provision, the railroad, we submit, is not entitled to recover under this count.

Under their third proposition they say, in effect, "Regardless of the contract, we have had this loss, and you were negligent and everything; we want to be paid; we want restitution," and they claim that they are entitled to be paid some $46,000.

To permit recovery of that nature, where it has been held that they were negligent, would be to find also that Booth-Kelly Lumber Company was, in fact, negligent; but even assuming [19] Booth-Kelly Lumber Company were negligent, one joint tort-feasor cannot collect from the other and, so, on this contract we submit, your Honor, they certainly would not be entitled to recover.

Looking at the record, your Honor, it will be seen—and I think it is quite obvious to all—that all that Booth-Kelly Lumber Company did was to create a condition. True, there was a wood cart left there. That created a condition. The railroad company was in a position—as will be seen by the Court from this transcript—to see any danger or hazard that was created by this cart. They knew it was there. The engineer knew it was there. The fireman knew it was there; the conductor knew it was there.

The brakeman, everybody knew it was there. According to this testimony, this plaintiff, Powers denied he knew it was there, but aside from him everybody else said they knew it was there.

So we submit, your Honor, that, under the evidence and under the law, the Booth-Kelly Lumber Company is entitled to a judgment of involuntary nonsuit.

The Court: Motion for involuntary nonsuit is overruled.

Mr. Powers: Pardon?

The Court: Motion for involuntary nonsuit is overruled. Have you got any evidence?

Mr. Powers: Yes, we will have some evidence, your Honor.

The Court: All right. Proceed.

Mr. Powers: We have an exception, as a matter of course, I [20] believe, to your Honor's ruling.

The Court: Yes.

Mr. Powers: First, I would like to offer our exhibits in evidence. We have here quite a voluminous transcript. It is not quite as long as it appears to be, because they don't use up the pages in full, but the pages, in double-spaced typewriting, number 370.

In this connection, is it your Honor's desire to read this or do you prefer to have us read it?

Mr. Corbett: I wonder if I might make a suggestion? About half of this testimony concerns medical testimony.

Mr. Powers: Right.

Mr. Corbett: Perhaps more than that, so that the actual amount to be read is not quite so great.

Mr. Powers: That is right. I have the medical part marked off.

The Court: Well, my suggestion is that you introduce it in evidence and let me read it.

Mr. Powers: It has already been introduced in evidence, your Honor.

The Court: Yes.

Mr. Powers: In other words, we won't have to bother about reading this?

The Court: No. As a matter of fact, I would very seriously object to your trying to read it. [21]

Mr. Powers: The defendant offers Defendant's Pre-Trial Exhibit No. 8, spur track agreement dated 1902, and, of course, Defendant's Pre-Trial Exhibit No. 9, spur track agreement dated January 4, 1909; also, Defendant's Pre-Trial Exhibit No. 10, another spur track agreement, and Defendant's Pre-Trial Exhibit No. 11, another spur track agreement, as well as Defendant's Pre-Trial Exhibit No. 12, another spur track agreement. Those are offered in evidence, and they are offered on the basis, your Honor, that they are necessary to explain the entire transaction.

Mr. Corbett: I object to them, your Honor, on the ground that they are incompetent, irrelevant and immaterial. We have in evidence the spur track agreement with which we are concerned. I see no purpose in introducing these other agreement, spur track agreements.

The Court: What are these other exhibits?

Mr. Powers: Spur track agreements that cover this same spur track since it was originally put in. We offer them to support our contention that there is no consideration for the indemnity provision contained in the 1941 agreement, and we believe that these will show that. We will offer them for the purpose of showing that this track was in operation and had been in operation for thirty-eight years.

The Court: I will permit them to go in evidence. I don't think the position is well taken because I think there is consideration in operation; there is consideration in continuing [22] operation.

Mr. Powers: Yes.

Mr. Corbett: If I may make a remark or two, I think, your Honor, the agreement of 1902, Exhibit No. 8, does not concern the track here involved, nor does Exhibit No. 12. Those concern two entirely different spur tracks. They also concern this industry, but they are distinct and apart and they have nothing to do with this transaction whatsoever.

Mr. Powers: We will endeavor to connect that up, your Honor.

The Court: All right. Put them in. The Court will strike them out if I don't see they are of any use. They are received subject to the objection.

(Spur Track Agreement, dated in 1902, was thereupon received in evidence and marked Defendant's Exhibit No. 8.)

(Spur Track Agreement, dated January 4,

1909, was thereupon received in evidence and marked Defendant's Exhibit No. 9.)

(Spur Track Agreement, dated February 27, 1909, was thereupon received in evidence and marked Defendant's Exhibit No. 10.)

(Spur Track Agreement, dated August 14, 1940, was thereupon received in evidence and marked Defendant's Exhibit No. 11.) [23]

(Spur Track Agreement, dated August 15, 1940, was thereupon received in evidence and marked Defendant's Exhibit No. 12.)

Mr. Powers: We would also like to offer in evidence at this time, your Honor, Defendant's Pre-Trial Exhibit No. 16, which is a letter written by the Southern Pacific Company to Booth-Kelly Lumber Company concerning the spur track agreement.

The Court: You entered into this agreement.

Mr. Powers: Pardon?

The Court: You entered into this agreement, did you?

Mr. Powers: The agreement signed in 1941, yes, your Honor. In this letter there is nothing said about any indemnity provision at all.

The Court: I know, but then you know perfectly well that previous negotiations do not affect the written contract. I do not have to explain that rule of law to you.

Mr. Corbett: This also concerns two spur tracks

which are not here involved. I will object to the letter on that ground.

The Court: Let me see it. If that is the size of it, I am going to reject it, of course.

This is rejected because it is something that relates to previous negotiations which are merged in the written contract.

Mr. Corbett: I will object to it on that ground, too, your Honor. [24]

The Court: I reject it.

Mr. Powers: In any event, it has been marked for identification. Perhaps it will keep out some other evidence that we have leading up to the negotiations and part of a continuing contract which had been in existence for a long time.

We will offer Defendant's Pre-Trial Exhibit 18, which is a picture that shows the boxcar caboose.

I would like to ask this of Counsel, if I may: During our pre-trial conference, when he saw this letter, I never heard him say that it was not the particular spur track we were talking about. If that is the fact, I would like to have you tell us about that, Mr. Corbett.

Mr. Corbett: I believe I mentioned in connection with Exhibit 8, certainly in connection with Exhibit No. 12, that this did not involve the spur track here involved.

Mr. Powers: You think it is a different track?

Mr. Corbett: Certainly.

Mr. Powers: Where? Could you show us here? We have got the map here now.

Mr. Corbett: Exhibit No. 12 shows on its face that it refers to a different track. In the upper right-hand corner it shows the track that was actually involved in the accident. It also refers to the 1902 agreement, which is Exhibit No. 8.

Mr. Powers: You have some agreement covering that spur where the accident occurred. [25]

Mr. Corbett: It is in evidence as Exhibit No. 1.

Mr. Powers: You do not recognize this as the same track? You don't recognize the track in Exhibit No. 1 as being the same track as that?

Mr. Corbett: They both show the same track but, if the Court please, Exhibit No. 12 shows there are two short spurs involved here, in Exhibit 12 and also in 8.

Mr. Powers: Do you thing there was a separate agreement for the other track, or is it embodied in this one?

Mr. Corbett: We are bringing the action upon the spur track agreement of June 30, 1941, a copy of which is in evidence as Plaintiff's Exhibit No. 1. Exhibit No. 12, which he offers in evidence, shows two short spurs that serve an entirely different area.

I wish to renew my objection to the introduction of Defendant's Exhibit No. 8 and No. 12.

The Court: I suspect that these are all probably inadmissible. That is why I made the reservation. They are admitted subject to the objection and the Court will determine later whether they have any

validity. I have not attempted to go into this thing now. Go ahead.

Mr. Powers: We have offered the photograph. Do you have any objection to that?

Mr. Corbett: No objection; no objection to Exhibit 18.

The Court: Admitted. [26]

(Picture of side-door caboose taken February 12, 1945, thereupon received in evidence and marked Defendant's Exhibit No. 18.)

Mr. Powers: We will call Mr. Nysten.

ORVILLE A. NYSTEN

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Powers:

Q. Your name is Orville A. Nysten?

A. Yes.

Q. Where do you live, Mr. Nysten?

A. Springfield, Oregon.

Q. Are you employed by the defendant?

A. I am.

Q. What is your work with the defendant?

A. Well, at the time of the accident, at the time the accident occurred I was superintendent.

Q. Superintendent?

A. Of the Booth-Kelly Lumber Company, yes.

(Testimony of Orville A. Nysten.)

Q. You were superintendent of the mill property, were you? A. Yes.

Q. What is your position now? [27]

A. Assistant superintendent.

Q. How long have you been employed at that property for the Booth-Kelly Lumber Company?

A. I commenced work the first day of April, 1911; continuous employment ever since; that is about, just about 38 or 37½.

Q. 37½ or 38 years? A. 37½ years.

Q. How many spur tracks do you have into the property?

A. Well, we got two loading tracks, where we load lumber, and then we got this logging track or spur where we push the logs up to the log pond.

Q. The logging track, is that where the accident occurred we are talking about?

A. That is right.

Q. How long has that logging track been in there?

A. It was there before I came there.

Mr. Corbett: Object to that as immaterial.

The Court: He has answered.

Mr. Corbett: I move that the answer be stricken.

The Court: Denied.

Q. (By Mr. Powers): You examined the blueprint attached to the track agreement, did you not?

A. I have, yes.

Q. Did you find the logging track that we are speaking of on both of those blueprints? [28]

(Testimony of Orville A. Nysten.)

A. Well, I think the logging——

Q. I will hand you Defendant's Exhibit No. 12, which is the agreement dated August 15, 1940, and ask you to examine that and see if you can find the line indicating the spur track on which this accident occurred?

Mr. Corbett: I will object to that, if your Honor please. I believe from this contract it can be seen what track is covered by it. If the agreement does not cover the spur track here involved, then that agreement is immaterial as far as this action is concerned. The fact that the agreement might have a map attached which also showed other tracks would have no bearing that I can see in this case.

The Court: Well, I don't know what his theory is.

Mr. Corbett: I beg your pardon.

Mr. Powers: Well, your Honor, my theory is that the first contract that they had covered this spur track that we are talking about in 1902, and it covered tracks in the mill and woods, all the way through. This spur track was put in under agreement made with the railroad company back in 1902 and this same track has been there all that time, I think, on both of these blueprints, that it is the track referred to in the 1902 agreement.

The Court: What difference does it make?

Mr. Powers: Well, your Honor, of course our evidence is going to disclose this as we go along, but

(Testimony of Orville A. Nysten.)

it makes a difference, [29] we believe, to show that there was no consideration here.

The Court: I do not see how it can be possible that there could be no consideration, when you signed the agreement to operate this and haul your product over this spur track. I don't see why it makes any difference whether you had an agreement of this type or not.

Mr. Powers: Well, under the decisions that I have read we felt that it did have something to do with it. Our evidence will disclose here they were hauling our logs; that this agreement gives them the right to use the track for any kind of business they want to use it for; that they are using this piece of track and they have been for the past several years, and while this was going on, not in connection with the business of the Booth-Kelly Lumber Company, but they were hauling logs for the Springfield Plywood Company; they hauled logs almost day in and day out across this track to the Springfield Plywood Company, not for the Booth-Kelly Lumber Company, because they have the right under this agreement to use it for their own purposes. They haul shingles for the Huntington Shingle Company, and they lease some of their property, Southern Pacific property, where this particular track is located. The Booth-Kelly Lumber Company does not own it. The Booth-Kelly Lumber Company does not own the property where this occurred, but it is leased from the Southern

(Testimony of Orville A. Nysten.)

Pacific to Booth-Kelly, for them to use it, I think for $70 a year or so. [30]

What I thought about this letter was, since the spur track has been in there for such a long period of time—And Mr. Nysten was going to testify that the track was in long before this 1940 agreement was signed—that it did not add anything else as far as that track was concerned; that they had to serve industry and that they had no right to insist, without any consideration, that they put in the indemnity provision. It is our contention they are common carriers and their duty is set forth, I believe, by a statute, and we would have a right to insist that they serve us, since we entered into an agreement which was still in effect—no consideration for canceling it—and presented another agreement to Booth-Kelly under the pretext that it was to show ownership and thereupon changed that ownership in the track. We think it has a very definite place in the case.

Inasmuch as the Court has taken up this question of consideration, we felt we should show the entire transaction. By this letter we have not offered or attempted to show anything that preceded this agreement, but we are trying to show the series of transactions that started from the first contract and continued on up to the time the accident occurred. This letter is only part of that series.

Mr. Corbett: If the Court please——

Mr. Powers: Excuse me. I might say that the agreement of 1941, I believe, refers to the agree-

(Testimony of Orville A. Nysten.)

ment back in January, January 4, 1919. [31]

Mr. Corbett: But not to the agreement in 1902 nor to the agreement signed August 15, 1940. Those are entirely different tracks.

The Court: Go ahead. I will receive the evidence. I do not want to hear a lot of argument about it. I don't think it has anything to do with it; I will tell you that right now.

Q. (By Mr. Powers): You went to work for Booth-Kelly Lumber Company about what date?

A. April, 1911.

Q. 1911? A. Yes.

Q. This spur track where the accident occurred was in there at that time?

A. Yes. That was the only way we had to bring logs into the company at that time.

Q. You used to bring logs in on railroad cars, that is, Booth-Kelly; isn't that a fact?

A. That is right.

Q. Where did those logs come from?

A. They came from Wendling.

Q. Has Booth-Kelly discontinued bringing logs in over that spur track?

A. Well, yes, they bring them in by trucks now.

Q. When did you stop your logging at Wendling? When did you stop bringing logs from Wendling? [32]

A. I don't know just the date but I imagine right around ten years, I imagine, or better since we quit that.

(Testimony of Orville A. Nysten.)

Q. Then you started hauling in by truck, is that right? A. That is right, by trucks.

Q. Do you have logs coming in over that spur track occasionally or on rare occasions now?

A. Oh, it might be possible. I wouldn't say we haven't had some, but there is very few cars for Booth-Kelly's own use.

Q. Whose logs come in over that track?

A. Springfield Plywood and Huntington Shingle Mills, some, but not all of them.

Q. The railroad uses this same spur track where the accident occurred for bringing in logs for the Springfield Plywood and the Huntington Shingle Mill? A. Yes.

Q. Where is the Huntington Shingle Mill located with respect to where the accident occurred? Is it towards the main line or is it away from the main line of the railroad?

A. It is away from the main line.

Q. The Huntington Shingle Mill—Are the dry kilns of that mill located on Southern Pacific property? A. Yes.

Mr. Corbett: I object to that, your Honor. I do not see the materiality of this particular question.

The Court: I am frank to say I do not see what any of it [33] has to do with the case.

Mr. Corbett: I would like a blanket objection to this whole line of testimony.

The Court: No. I won't do that. I will overrule the objection. As I say, I think it is very doubtful

(Testimony of Orville A. Nysten.)

that it has any place in the case, but I will listen to the evidence.

Q. (By Mr. Powers): Did you go out to the scene of the accident after it occurred that day?

A. Yes, I did.

Q. The logs that were brought in that particular day, were they coming in for Booth-Kelly or someone else?

Mr. Corbett: Object to that, your Honor, on the ground that the defense of the case of Powers vs. Southern Pacific having been tendered to Booth-Kelly, they are estopped from going back of the facts as there determined.

The Court: Objection overruled.

Q. (By Mr. Powers): To whom did the logs belong that Southern Pacific brought in the day that the accident occurred?

A. Springfield Plywood Company.

Q. Can you tell the Court something about the woodcart that was there at that time, Mr. Nysten?

The Court: Isn't this all in the tetsimony, one way or another, set forth in the pre-trial order?

Mr. Powers: Yes.

Mr. Corbett: I would like to object to that question, your [34] Honor, as incompetent, irrelevant and immaterial. It covers a fact already determined by the pre-trial order.

Mr. Powers: We could not give you a good description, I thought, after ten years, by a photograph of what the thing looked like. It is not of

(Testimony of Orville A. Nysten.)

any particular consequence except I wanted to show the Court what it was and how it happened to be there. There is nothing in that to show how it happened to be there at the time when it was left there by the defendant.

The Court: Well, I don't see what you are talking about, but you go ahead on your own theory. I think this is all irrelevant and immaterial.

Mr. Corbett: My objection is overruled?

The Court: Yes, objection overruled.

Q. (By Mr. Powers): What is the cart used for that was there at that time?

A. It is to haul wood, a woodcart, I think.

Q. What is the wood used for?

A. For locomotive cranes.

Q. Where are the carts filled up?

A. At the plant.

Q. That is, over at the sawmill?

A. The Booth-Kelly plant.

Q. How do you get them out to the cranes?

A. Pulled over by a tractor or jitney.

Q. This particular area where the woodcart is located, is [35] there a road for vehicular travel right along there? A. Yes.

Q. Did you have any knowledge, any personal knowledge, that this cart was there before the accident, had been left that close to the track?

Mr. Corbett: Object to that, your Honor. It is admitted it was placed and left there by the defend-

(Testimony of Orville A. Nysten.)

ant. I think this is all immaterial, incompetent and irrelevant.

The Court: Objection overruled.

Q. (By Mr. Powers): Did you have any personal knowledge that the cart was there?

A. I know one of the fellows come and asked for wood to be brought up there but I didn't see the cart actually pulled over to the track, but that particular cart was standing there for a few days, I know. Nobody made any objection to it. In fact, I really thought it was in proper clearance of the track, but I guess it wasn't.

Q. You don't remember how close it was to the rail, is that it?

A. I didn't, not before the accident.

Q. Mr. Nysten, this area where the accident occurred—Going back to the time that the accident occurred—were there numerous employees of Booth-Kelly around there? A. No.

Q. Was it a remote place, or otherwise?

A. People would go by there, but not very often. [36]

Q. What employees of Booth-Kelly were working around there, any where close around there?

A. Nobody working right there at that particular place; that is, right where that cart was sitting.

Q. How close to the cranes that you are speaking about was that kindling?

A. I imagine about a couple of thousand feet

(Testimony of Orville A. Nysten.)

or better; maybe more than that from that place. I don't just quite——

Q. Over this long period of years that it has been there do you ever remember any occasion when there would be impaired clearance?

A. As I have been notified, yes.

Mr. Corbett: I object to that as not responsive.

The Court: Objection sustained. Stricken.

Q. (By Mr. Powers): Over that period of years you have had some dealings with the railroad company with respect to their switching operations?

Mr. Corbett: That is objected to, your Honor.

The Court: It is not going to hurt. I can get his answer without being prejudiced.

Q. (By Mr. Powers): Did you answer?

A. No, I didn't answer. What was the question?

Q. Well, I will reframe it. When any negotiations were carried on by the railroad employees with the Booth-Kelly mill with respect to obstructions on the track, clearances and so forth, how were they carried on? [37]

Mr. Corbett: I object to that as immaterial, and object to this whole line of testimony on the ground that he is seeking to vary a written document by parole evidence.

The Court: Objection overruled.

Q. (By Mr. Powers): How were they carried on?

A. Oh, with me.

(Testimony of Orville A. Nysten.)

Q. They carried on those negotiations with you?

A. Yes.

Q. Was there a course of procedure or a custom and practice there with respect to having obstructions removed where the clearance was impaired?

Mr. Corbett: Objected to as calling for a conclusion of the witness, also seeking to obtain testimony that would vary a written contract. Objected to on the further ground that the answer, if given, would be irrelevant since the witness has admitted now the presence of the cart and, furthermore, it is admitted in the pre-trial order that the defendant knew of the presence of the cart by reason of the fact that they placed it there, so this evidence would be immaterial.

The Court: Objection sustained.

Mr. Powers: We are offering it for a little different reason, your Honor. The point is raised in the pre-trial order whether there was a custom and practice here and an interpretation placed on the contract by the parties themselves with respect to any obstructions or any impairment of clearance, and [38] it was to that end that we sought to develop——

The Court: Just a moment. I have already ruled. Just let it go at that. Objection sustained.

Mr. Powers: All right, your Honor.

Q. After this spur track was in there, were there any extensions to the spur track near where the accident occurred?

(Testimony of Orville A. Nysten.)

A. Not where the accident occurred, no.

Q. Remained the same all the time you were there, from 1911 down to date?

A. It might have been added to at the other end, about a half-mile or a mile further down.

Q. Did the railroad company, with respect to this particular date when the accident occurred, when the cart was there, ever give you notice that it was impairing the clearance, or to move it?

Mr. Corbett: Objected to as incompetent, irrelevant and immaterial. The cart was placed there by Booth-Kelly Lumber Company. Notice would not be material in any event since the Booth-Kelly Lumber Company is presumed to know its own actions.

The Court: Objection overruled.

Q. (By Mr. Powers): Did they give you any notice about moving it or make any complaint of impaired clearance? A. No.

Q. You have seen the converted boxcar that was used as a caboose, have you? [39]

A. Yes.

Q. Can you tell the Court the difference between an ordinary caboose and that boxcar, as far as a person descending therefrom is concerned?

Mr. Corbett: I believe that is already covered in the testimony in the case and I will object to it as being irrelevant, your Honor.

The Court: Objection overruled.

Q. (By Mr. Powers): Would you tell the Court, please?

(Testimony of Orville A. Nysten.)

A. Well, a converted boxcar is a car that hasn't got regular steps on the front and back end of it; just a door, which has handbars;—What the S.P. Company call them I don't know—I don't know what they call these, but that is the difference. A caboose has regular steps and railings and you don't have—In other words, you don't have to back out of it to go down from the front end, either the front end or back end.

Q. You do not have to back out of the regular caboose? A. No.

Q. Out of this converted caboose, do you have to back out? A. Have to back out.

Q. Are the steps on the regular caboose back out of the line of the train? In other words, do they stick out beyond the side of the car?

A. The regular caboose has regular steps right down. They don't stick outside, no.

Q. They do not? [40] A. No.

Q. In getting out of this converted boxcar——

A. Well, I really have—I haven't really examined it real close, but I think it is right under the boxcar, myself, the steps.

Q. Over your long period of time there as superintendent and as an employee, do you know about the way in which the railroad company operates its trains, the rules and regulations for operating and for flagmen and brakemen?

Mr. Corbett: Object to that as immaterial. I

(Testimony of Orville A. Nysten.)

don't know—I don't see how that has any bearing on this case.

The Court: Objection sustained.

Mr. Powers: I believe that is all, your Honor. Could we make an offer of proof?

The Court: Oh, yes. Dictate it into the record. You may dictate it in the record after court.

Mr. Powers: Yes, your Honor.

The Court: The Court is going to recess now until tomorrow morning at 10:00 o'clock.

Mr. Corbett: Has Counsel rested his case?

Mr. Powers: No.

Defendant's Offer of Proof

Mr. Powers: If the Witness Nysten had been allowed to answer the questions with respect to which the Court sustained plaintiff's objections, he would have testified that there had [41] been a course of conduct in dealings between the parties whereby when any obstruction or impairment of the clearance existed, which the railroad company felt needed to be removed, that the railroad company, through its employees,—sometimes the train crew and sometimes the freight or station agent—would notify this witness or other employees of the Booth-Kelly Lumber Company and they invariably would remove the obstruction immediately; that on numerous occasions there have been loads of lumber on push trucks, there have been carts, automobile trucks and automobiles that were as

close or closer than this particular wood cart from the nearest rail, and these obstructions, when called to the attention of the Booth-Kelly Lumber Company, would always be removed and removed immediately.

This witness would further testify that he did not say that he had personal knowledge that this wood cart was located within forty-two inches of the nearest rail, as stated by plaintiff's counsel, but, on the contrary, he stated that he knew that the wood cart was up there but did not know that it interfered with the clearance; if he were allowed to clear this matter up, that is what he would testify to, which evidence was kept out by objection of plaintiff's counsel. [42]

Friday, November 12, 1948, hearing of the above-entitled cause was resumed pursuant to adjournment.

The Court: I have decided, Mr. Powers, to let you put in all the evidence you think is competent, subject to objection.

Mr. Powers: Thank you, your Honor.

The Court: Even though I think right now that this matter, although mentioned in the pre-trial order—I think this matter of custom, at least in that form, is not pertinent but, in any event, in order to be sure that you have opportunity to present your theories, the evidence will be received, subject to the objection, with the idea even-

tually, upon consideration of the case, that I will strike it out if I think it should be stricken.

ORVILLE A. NYSTEN

having been previously duly sworn, thereupon was recalled as a witness on behalf of Defendant, and was examined and testified as follows:

Direct Examination

Mr. Corbett: Before we commence, your Honor, if this relates to testimony that was previously stricken, it won't be necessary for me to renew my objections to each question, will it?

The Court: I think you had better renew your objection when the evidence comes in. I say that because—It doesn't make any difference to me—these appellate courts act under this rule that says if there is any issue to try which is not objected to [43] that they can decide the case on that, without anything further, and I think, if you are going to protect your record, you should make proper objections. I would not consider it at all if I thought it was not a proper issue, but some appellate court might say that you consented, so you had better protect your record and state your objections when you think they should properly be made.

Mr. Corbett: Thank you, your Honor.

Q. (By Mr. Powers): Mr. Nysten, over the period of years while you were superintendent, and

(Testimony of Orville A. Nysten.)

with respect to the spur track of the Booth-Kelly Lumber Company, was there a custom or practice developed as to the removal of any obstructions to the clearance between the Booth-Kelly Lumber Company and the railroad?

Mr. Corbett: I will object to that, your Honor.

A. Our traffic——

Mr. Corbett: I will object to that on the ground it is incompetent, irrelevant and immaterial and on the ground that it is an attempt to vary the terms of a written instrument; it is irrelevant since it would have to do with giving notice of a condition which was placed there in this particular case by the defendant, and that there would be no authority on the part of the defendant to create such a variation of a written contract.

The Court: The testimony will be received at the present time, subject to the objection. The objection is overruled. [44]

Q. (By Mr. Powers): Will you answer the question, Mr. Nysten? A. Yes.

Q. And what was the practice when there was an obstruction to the rail clearance?

A. Well,——

Mr. Corbett: The same objection, your Honor.

The Court: The same ruling.

A. We always cleared it.

Q. (By Mr. Powers): And who would notify you to clear it?

Mr. Corbett: The same objection.

(Testimony of Orville A. Nysten.)

The Court: The same ruling.

A. Generally the agent or brakeman, and so on, whoever noticed the obstruction.

Q. (By Mr. Powers): When you speak of the agent, which agent do you refer to?

Mr. Corbett: The same objection, your Honor.

The Court: The same ruling.

A. At the station there, the depot agent.

The Court: What is the name?

A. Allen.

The Court: What are the names of these other people?

A. Well, I don't know the brakeman.

Q. (By Mr. Powers): The various members of the train crews?

A. No, I don't know them.

Mr. Corbett: The same objection. [45]

The Court: The same ruling. Besides, I would suggest you had better let the witness testify.

Mr. Powers: Yes.

Q. When you say the brakeman would tell you, the brakeman of what?

Mr. Corbett: The same objection.

The Court: The same ruling.

A. Sometimes might be something in their way, maybe, that I didn't think really was safe, but not very often that happened.

Q. (By Mr. Powers): What kind of obstructions would that be?

Mr. Corbett: The same objection.

(Testimony of Orville A. Nysten.)

The Court: The same ruling.

A. Well, that varies; something dropping off a truck of maybe a stick of lumber, you know, by moving lumber and stuff like that, you see, would be turned around and be close to the track, but we watched that pretty thoroughly ourselves, but it is possible, you know, around a plant——

Mr. Corbett: Object to that and move that it be stricken as not responsive.

The Court: The same ruling. Motion denied.

Q. (By Mr. Powers): Mr. Nysten, with respect to the point where this accident occurred, could you make a mark on the blueprint which we have in evidence, showing where the accident occurred? It is a plaintiff's exhibit.

Mr. Corbett: Object to that, your Honor. That is determined [46] in the previous case of Powers against the Southern Pacific, and I object to that unless the Court desires to have it done.

Mr. Powers: That is the only reason I am doing it, your Honor. You might wade through that entire transcript and finally locate it, but we have a plat here——

The Court: All right.

Mr. Powers: If we could have him mark it, it would simplify it.

The Court: Objection overruled.

Mr. Powers: Hand the witness Plaintiff's Exhibit No. 1.

(Plaintiff's Exhibit No. 1 handed to the witness.)

(Testimony of Orville A. Nysten.)

Q. (By Mr. Powers): Attached at the bottom you will find a blueprint, I believe. Are you able to find the location where the accident occurred on the blueprint? A. Yes.

The Court: Step down to the table and do that.

Q. (By Mr. Powers): Make an "X" mark, if you please, here where the accident occurred, if you find the point where the cart was located at the time the accident occurred.

A. (Witness illustrates as instructed.)

The Court: This is in red, that line pointing to the spot, that spot, is that right?

A. Yes.

Q. (By Mr. Powers): That mark that you have made on the exhibit, Mr. Nysten, as to where the accident occurred, what distance is [47] that from the railroad station, in a direct line?

A. Oh, I wouldn't think it is over about 150 or 200 feet, not over that, I don't believe; about 200 feet, I imagine.

Q. The mark you have made with the red pencil, that is somewhat lighter than these other lines.

A. With the red pencil, yes.

Q. Over near the circle that is marked "W.C."?

A. Yes.

Q. What is that "W.C."?

A. That is "Wood Cart."

Q. Then there is a mark on this blueprint "W.T." out there. It is kind of a circle. Do you know what that is? A. "W.T." in a circle?

(Testimony of Orville A. Nysten.)

Q. Yes.

The Court: I think I know.

Mr. Powers: All right. I thought I did, too, but I didn't want to make any suggestions.

The Court: All right. You can ask him.

Q. (By Mr. Powers): Is there any place there for them to water their engines? That "W.T." with a circle around, what is that?

A. That is for the water tank.

Q. The water tank? A. Yes.

Q. The property where the accident occurred, is that owned by the Booth-Kelly Lumber Company, or do you know? [48]

Mr. Corbett: Object to that as immaterial.

The Court: Objection overruled for the present. You may answer.

A. Well, I really believe that is S.P. Company's property.

Mr. Powers: While it is the S.P. property, the Booth-Kelly Lumber Company leases the area out there, does it not? A. That is right.

Q. For about $70 a year?

A. Well, I don't know what they pay, but they lease the land on that track there (indicating).

Q. In the general vicinity where the cart was located is there a roadway?

A. That is right. There is a regular roadway up there.

Q. The spur track which we call the logging track, does the railroad use that track for anything other than you mentioned yesterday?

(Testimony of Orville A. Nysten.)

A. They use it sometimes—It was the practice when they pull in to shove the caboose up there so they would have more room to switch. It is pretty crowded for room there anyway, I believe, for switching facilities.

Q. The Huntington Shingle Mill you referred to yesterday, is freight from there moved over this logging spur? A. That is right.

Mr. Corbett: Object to that as immaterial.

The Court: Objection overruled. [49]

Mr. Corbett: Incompetent, irrelevant and immaterial.

The Court: Objection overruled for the present.

Q. (By Mr. Powers): Is part of the Huntington Shingle Mill located on the property owned by the Southern Pacific?

A. Part of the property is.

Mr. Corbett: Objected to as immaterial.

The Court: He may answer.

Q. (By Mr. Powers): You have looked at the blueprint, Mr. Nysten, the one attached to Plaintiff's Exhibit No. 1 and also to the blueprint attached to Defendant's Exhibit No. 12.

A. I don't believe I have seen the blueprint of 12.

Q. Do you see the lines indicating the spur track you have been testifying about on both blueprints? A. Yes.

Mr. Corbett: Object to that testimony as incompetent, irrelevant and immaterial. These docu-

(Testimony of Orville A. Nysten.)

ments speak for themselves. I don't think oral testimony would add anything to them.

The Court: The objection is overruled for the present.

Q. (By Mr. Powers): What is your answer?

A. I said the same drawings, except that there are two more tracks on it.

Q. The spur track you have been talking about, that has been in the same location, the same place, ever since you went there in 1911?

A. That is right, ever since I worked there.

Mr. Powers: I believe that is all, your Honor.

The Court: The Court gives you the right to cross-examine now, without waiving your objections.

Mr. Corbett: Very well, your Honor.

Mr. Powers: Perhaps I should put in some exhibits that I did not get offered yesterday. Defendant's Exhibit No. 14, marked at pre-trial, is a copy of the general safety rules of the Southern Pacific. We will offer that in evidence.

Mr. Corbett: I will object to the introduction of the rules as incompetent, irrelevant and immaterial. I believe there is some mention of the rules, some specific rules, in the Powers case and as to those, of course, I would have no objection, since they are already in the record.

The Court: It will be received, subject to the objection.

(Testimony of Orville A. Nysten.)

(Copy of General Safety Rules, Southern Pacific Company, thereupon received in evidence and marked Defendant's Exhibit No. 14.)

Mr. Powers: The defendant would also like to offer in evidence Pre-Trial Exhibit No. 15, marked for identification. It is a copy of the rules and regulations for the maintenance of way of the Southern Pacific Company. I might say, your Honor, these rules were furnished to us by the Southern Pacific.

Mr. Corbett: The same objection, your Honor.

The Court: Objection overruled for the present. The exhibit is received, subject to objection. [51]

(Copy of Rules and Regulations, Maintenance of Way, Southern Pacific Company, thereupon received in evidence and marked Defendant's Exhibit No. 15.)

Mr. Powers: We would like to offer in evidence, your Honor, Defendant's Pre-Trial Exhibit No. 17, which is a letter dated February 5, 1940, written by the Southern Pacific Company to the Booth-Kelly Lumber Company.

The Court: I will stand on my ruling on that.

Mr. Corbett: I will object to it, your Honor.

The Court: I don't think that has anything to do with the situation, if that is the same letter you offered.

Mr. Powers: It is not the same letter, but it

(Testimony of Orville A. Nysten.)

goes to the same matter, your Honor. I merely offer it to show what was going on at the time that contract was entered into.

Mr. Corbett: This is dated in February and the agreement was signed—This was dated in February, 1940, and the agreement was signed in June of 1941.

The Court: Rejected.

Mr. Corbett: I have no cross-examination, your Honor.

(Witness excused.)

Mr. Powers: I am going to ask Counsel to stipulate about one answer which they gave us, if the matter becomes an issue in the case as to the combined negligence or proximate cause. [52] There is one allegation that the railroad was negligent in not having any signs posted on the boxcar telling anybody in getting out of there that they should first look, and that they have got to go out backwards. We are asking Counsel to stipulate that there were no signs posted in or on the caboose covering the manner of detraining.

Mr. Corbett: I am not sure as to whether that is in the pre-trial order. I think a contention is made as to that that states the fact correctly, your Honor, but I am not sure whether that would require an amendment of the pre-trial order or how that would be handled.

Mr. Powers: The pre-trial contention is that the railroad company failed to put a sign in the

converted caboose warning trainmen of the danger descending therefrom in a backward manner without first looking to see the way was clear.

Mr. Corbett: That is correct. There is a statement made in the answer to the interrogatory.

The Court: Read it into the record.

Mr. Powers: "No signs were posted in or on the caboose regarding the manner of detraining." It is so stipulated.

Mr. Corbett: Yes.

The Court: I suppose it is objected to on account of materiality?

Mr. Corbett: Yes, your Honor. I would object to it on that ground, although it states the fact correctly. [53]

The Court: Objection overruled for the present.

Mr. Powers: That is our defense, your Honor. The rest would be merely cumulative.

Mr. Corbett: With regard to the testimony as to custom, would it be permissible for me, without waiving my objection, to put on a rebuttal witness?

The Court: Yes.

Mr. Corbett: In regard to that testimony?

The Court: Yes.

Mr. Corbett: May I ask a short recess? I want to have Mr. McColloch called as a witness as to that, and he could be here in a short time, I am sure.

The Court: Yes. I will permit that. Have you any objection?

Mr. Powers: No objection, your Honor, at all. If it would save any time, I could make a motion now or I could make it after they get their evidence in.

Mr. Corbett: That would not change the legal points at all going to the rest of the motion for a directed verdict.

The Court: Could you stipulate as to what Mr. McColloch would testify to?

Mr. Powers: Have you in mind what that is?

Mr. Corbett: Yes.

Mr. Powers: Go ahead and state what he would testify to.

Mr. Corbett: Mr. McColloch, if called as a witness, as a [54] rebuttal witness, with regard to this matter of custom, would testify that the only employee of the Southern Pacific Company in the State of Oregon who would have authority to sign leases and similar agreements would be the superintendent and——

The Court: What is his name?

Mr. Corbett: In this case I believe Mr. E. L. King was superintendent at the time this agreement was signed; that he would only enter into such agreements after approval from the management in San Francisco; and that, in cases of industrial track agreements, or in some cases of industrial track agreements, the whole matter

would have to be approved by the executive committee of the company.

There is one exception to that and that would be the General Agent in Oregon who, at that time, would have been Alfred A. Hampson.

This testimony would go to the lack of authority on the part of employees to establish any such a custom.

The Court: Who is Mr. McColloch?

Mr. Corbett: Mr. Frank T. McColloch is the statutory agent and attorney-in-fact and general agent for the Southern Pacific Company in Oregon at the present time.

The Court: Does he have actual knowledge of the things about which he would testify?

Mr. Corbett: He would have actual knowledge of the authority. Will you stipulate as to that testimony? [55]

Mr. Powers: I will stipulate that if he were called he would testify to that effect.

Mr. Corbett: It is understood that testimony, your Honor, is going in under that stipulation, that we are not waiving any objections we may have as to that testimony as to custom.

The Court: The Court will so direct. Mr. Powers, I assume you think that is not material and you will be allowed an exception to that.

Mr. Powers: Yes, your Honor. Thank you.

Mr. Corbett: The plaintiff rests.

Defendant's Motion for Directed Verdict

Mr. Powers: At this time, if the Court please, the defendant moves the Court for a directed verdict on the ground that it appears under the law that they are not entitled to recover on any of their counts.

It appears from the evidence that they have submitted and under the stipulation the primary cause or loss was the railroad company's own negligence, and that a common carrier cannot recover under such a contract if it is a loss suffered through its own negligence or, for that matter, the negligence of the company combined with that of anyone else. We also would like to incorporate the same grounds mentioned in connection with the motion for nonsuit, just to save time.

The Court: Yes. [56]

Mr. Powers: We have this additional contention at this time, your Honor, that it now appears in the record that at the time the accident occurred the logs being moved were being moved for the Springfield Plywood Company and not for the Booth-Kelly Lumber Company, and under the interpretation which I think would be placed on the contract, in any event, there is certainly nothing in the agreement which makes it manifestly clear that the intention was that where the railroad company was doing something for its own benefit, operating as a common carrier, hauling other people's freight, that this defendant would not be required to indemnify the railroad. I call your

Honor's attention to the fact that in this agreement the railroad company, starting with the earliest agreement, consistently reserved to itself the right to use this track in its own business and that is what it was doing here.

As to the last count in which they seek to recover on the basis that maybe both the parties were negligent here, we submit they are barred from recovery on the basis that one tort-feasor cannot recover from the other, under the laws of Oregon.

The Court: The motion is for directed verdict—That does not quite describe it, because when a Court is trying a case without a jury there is no such a motion, I take it, but it would be for judgment as a matter of law. It is denied. The Court is going to decide this case on the facts. The [57] facts have all been presented. There is no reason for ruling on the question of law. The Court will determine what the facts are and thereupon decide the law in relation to the facts.

I think there is quite a serious question in this case. I think both sides had better brief it. That is my notion about it.

I will give you some light on the question. I think the question is serious because of the fact that the Southern Pacific Company was not subjected to liability because of the condition itself or negligence in leaving the obstruction there. The groundwork apparently was the liability which was imposed upon the Southern Pacific Company by a failure to warn which seems to take it out of the

category of things for which it can ask for indemnity but, on the other hand, the contract is fairly specific with respect to what Booth-Kelly Lumber Company did, indemnifying itself against all liability for any accident; but, as regards failure of consideration, I do not think that business corporations enter into this kind of a contract without knowing what they are doing, and I think that the Booth-Kelly Lumber Company certainly thought that there was some consideration or they would not have done it and, so, I don't know why I should be wiser than the contracting parties. Business corporations usually have fairly competent legal advice. In this instance I suspect that they both had it and so, therefore, in a contract which is as specific as this one is, and where [59] various clauses are stricken out of the form and various clauses are added on top of the form, I am of the opinion that they knew what they were doing in the first place, and that they had legal advice on the subject, and at least both sides thought there was a consideration, and it would be very difficult for me to make a finding of lack of consideration, but I will still keep an open mind on it, if counsel can convince me on the subject. I would be glad to hear any arguments that counsel may wish to present, in briefs. I really think that is one of the things that a Court is not supposed to know, that business corporations usually act advisedly. This Court happens to know, and, so,

you won't spend too much time in arguing that they did not know what they were doing.

I still say on the other feature I think there is a very serious question. I think it is a very close question and I would appreciate all the light I can get from counsel. How much time do you wish to have? Mr. Corbett, I assume you will have the burden.

Mr. Corbett: If twenty days would be agreeable to the Court——

The Court: I do not care how much time you take. I shall give you whatever time you suggest.

Mr. Corbett: Then I might suggest thirty days, and I will try to get my brief in before that time, if that is possible. [59]

The Court: All right; thirty days to each side, and five days to you to reply.

Mr. Corbett: I would like to suggest that I file the opening brief, that Mr. Powers file the answering brief explaining his contention, and then that I be allowed time to file a reply. I am not saying I would be able to answer in five days, your Honor. I would rather have a shorter time to open and add that time for replying.

The Court: All right. I will give you ten days.

Mr. Corbett: Very well.

The Court: Thirty, thirty and ten. Anything else, Gentlemen?

Mr. Powers: I believe that is all, your Honor.

The Court: The Court is in recess. [60]

United States District Court
District of Oregon

No. Civil 3989

SOUTHERN PACIFIC COMPANY,
a Corporation,

Plaintiff,

vs.

THE BOOTH-KELLY LUMBER COMPANY,
a Corporation,

Defendant.

Before: Honorable James Alger Fee,
Judge.

June 13, 1949

DECISION OF THE COURT

The Court: Southern Pacific Company, a corporation, Plaintiff, against The Booth-Kelly Lumber Company, Defendant, Civil 3989.

This is an action brought by the Southern Pacific Company on account of the loss sustained by that company as plaintiff as a result of an accident which happened upon the spur track operated partially for the convenience of The Booth-Kelly Lumber Company. The matter arises under a written contract between the plaintiff and defendant.

The Southern Pacific Company was sued in California for the injury, and Powers, the plaintiff there, recovered a substantial judgment.

The question presented to this Court is as to whether there can be a recovery by the Southern Pacific Company upon the contract with The Booth-Kelly Lumber Company, and the Court rules that there can be. In view of the fact that its interests were served by the making of this contract, and in view of the fact that the accident would not have happened if it had not been for an act of defendant which an ordinarily prudent person would not have done, it is just and in accordance with its contract that it should pay the loss. However, since the railroad was in some measure also at fault which contributed to the accident, judgment is given under the contract for only one-half of the damage.

The Court has tried the question of damage on the transcript introduced in evidence in this case. However, the Court did not treat the finding as binding in any respect, using it simply as advisory under the transcript.

The Court therefore will make findings in accordance with the requests which were set out in the pre-trial order, as follows:

Issues of Fact

1. Was the damage to Powers and the liability of plaintiff the natural or necessary result of defendant's breach of contract?

Yes.

If so, in what amount?

$44,000.00.

2. Was plaintiff damaged by reason of an act or omission of the defendant, its agents or employees, to an employee of plaintiff while on the industrial track?

Yes.

If so, in what amount?

The actual loss of plaintiff, the amount of the judgment, and the amount of legal fees and costs involved in this action. This was the loss. The question of whether it was legal damage or not is another matter, and is answered in the first question.

3. Was defendant negligent in placing and leaving the wood cart within 42 inches from the track?

Yes.

4. If so, was defendant's negligence in this regard the active or primary cause of the injury to plaintiff's employee, Powers?

Yes.

5. Did the damage to plaintiff's employee arise from the joint or concurring negligence of plaintiff and defendant?

Yes, the direct, proximate and primary cause of the injury being the negligence of defendant, but with some elements which concurred to cause the accident on the part of the plaintiff. Powers vs. Southern Pacific was between different parties and is not treated as res adjudicata here. The Court,

however, did consider the amount of the verdict as a fair appraisal of the damage to Powers.

6. In the matter of the railroad company's negligence as determined in the California proceeding and trial res adjudicata?

No.

If not, was the railroad company negligent in any of the particulars specified in the defendant's contentions?

The Court considers the acts or omissions of the employees of plaintiff contributed to the injury of Powers, but not in the form of the specifications of the defendant.

7. Was the negligence of Booth-Kelly, if any, remote?

No.

8. Was there any consideration for the indemnity provision in the track agreement?

Yes.

9. Is plaintiff barred from recovering under the track agreement by reason of its own acts and conduct?

No.

10. Was there a custom or practice between the parties under which the plaintiff would give notice to defendant of any objectionable obstruction to track clearance, and a further custom of defendant removing the same at the request of the railroad?

No. Any acts of this sort upon the part of the

railway employees would simply be in an attempt to maintain a safe operation. No matter how many times such incidents occurred these incidents would not ripen into a custom. It was simply an attempt to keep a safe operation of the railroad.

11. Did the plaintiff discover the alleged breach prior to the accident; and, if so, was the loss and damage caused by plaintiff's conduct in continuing operations without taking steps to have the cart removed or to warn its employees thereof?

Some of the employees of plaintiff observed the position of the cart, and operations and work continued thereafter. However, the loss and damage were not proximately caused by these conditions, although they may have had some contributing effect.

Issues of Law

A. Was the placing and leaving of the wood cart within 42 inches from the track a breach of the contract by defendant?

That is a trick question, but I answer it as follows: Yes, under all the surrounding circumstances, since the loss to plaintiff was a direct and proximate result.

B. Is plaintiff entitled to be indemnified by defendant under the industrial track agreement in the sum of $46,568.99, or any part thereof?

No, not as such.

C. Is defendant obligated to pay plaintiff $46,-

568.99, or any part thereof, independent of the agreement?

No, not as such.

D. Can an employer under the Federal Employers Liability Act delegate the duties imposed upon him under the Act?

That question, in the Court's opinion, has no relevance to the situation, but the answer is No, not between the railroad and the employee.

E. Is the negligence imposed upon an employer for violation of the Federal Employers Liability Act, resulting in injuries to an employee, considered to be primary negligence?

I do not understand that question, but the Court rules that in the action between other parties if there was a violation of the Federal Employers Liability Act the injured employee would be entitled to recover in that action, but there is no relevancy between that situation and this case between other parties.

F. Can a railroad operating as a common carrier contract to be held harmless against its own negligence, or is such a contract void as against public policy?

This contract is valid even though the acts of employees of plaintiff may have contributed to and resulted in the injury to Powers.

G. Whose control was the track under, and did the track area include the point and place where the cart was located?

This is another catch question which the Court considers entirely immaterial and therefore disregards.

H. Did the railroad have the right to have any obstructions removed which the railroad deemed hazardous?

Yes.

I. Was there a waiver of any breach, if one existed?

No.

The Court finds, using the verdict as advisory, that Powers suffered injuries in the sum of $44,000.00. The acts and omissions of the defendant were the direct and proximate cause thereof. The acts and omissions of plaintiff contributed thereto in some measure. Plaintiff paid out a greater sum than the damage found. Therefore, the Court awards $22,000.00 to plaintiff on the contract.

[Endorsed]: Filed Aug. 19, 1949.

[Title of District Court and Cause.]

REPORTERS' CERTIFICATE

We, Ira G. Holcomb and John S. Beckwith, Official Reporters of the above-entitled Court, do hereby certify that on the 11th and 12th days of November, 1948, and on the 13th day of June, 1949, we reported in shorthand certain proceedings had in the above-entitled matter, that we thereafter caused our respective shorthand notes to be reduced to typewriting under our direction, and that the foregoing transcript, consisting of Pages numbered 1 to 67, both inclusive, constitutes a full, true and accurate transcript of said proceedings, the respective portions of which transcribed by each of us are as follows: Pages 1 to 60, Ira G. Holcomb; Pages 61 to 67, John S. Beckwith, so reported by us in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated this 13th day of August, A.D. 1949.

/s/ IRA G. HOLCOMB,

/s/ JOHN S. BECKWITH.

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of

complaint, answer, pre-trial order, findings of fact and conclusions of law, judgment order, notice of appeal, bond on appeal, notice of cross-appeal, bond on cross-appeal, order to send original exhibits, appellant's designation of record, transcript of docket entries, and clerk's certificate, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 3989, in which The Booth-Kelly Lumber Company is defendant and appellant, and the Southern Pacific Company is plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of proceedings dated November 11 and 12, 1948, and June 13, 1949, together with exhibits 1, 2a, 2b, 2c, 2d, 2e, 2f, 2g, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 18, inclusive.

I further certify that the cost of preparing the within transcript is $1.60, and the cost of filing the notice of appeal is $5.00, making a total of $6.60, and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 26th day of August, 1949.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12340. United States Court of Appeals for the Ninth Circuit. Booth-Kelley Lumber Company, a Corporation, Appellant, vs. Southern Pacific Company, a Corporation, Appellee, and Southern Pacific Company, a Corporation, Appellant, vs. Booth-Kelley Lumber Company, a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Oregon.

Filed August 29, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12340

BOOTH-KELLY LUMBER COMPANY,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

and

SOUTHERN PACIFIC COMPANY,
Plaintiff,

vs.

BOOTH-KELLY LUMBER COMPANY,
Defendant.

DESIGNATION OF RECORD TO BE PRINTED ON APPEAL HEREIN.

It Is Stipulated by and between the attorneys for the respective parties hereto that the following be printed as a record of appeal herein, omitting therefrom headings, titles and such formal matters:

1. Pleadings.

2. Pre-trial Order.

3. Reporter's Transcript of entire trial proceedings.

4. Findings of Fact and Conclusions of Law and Judgment Order entered thereon.

5. Opinion of the Court.

6. Notice of Appeal and cross-Appeal.

/s/ JAMES ARTHUR POWERS,
Of Attorneys for Booth-Kelly Lumber Company.

/s/ ALFRED H. CORBETT,
Of Attorneys for Southern Pacific Company.

[Endorsed]: Filed Sept. 21, 1949.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 12340

BOOTH-KELLY LUMBER COMPANY,
a Corporation,
Appellant-Defendant.

vs.

SOUTHERN PACIFIC CORPORATION,
a Corporation,
Cross-Appellant-Plaintiff.

STIPULATION

It Is Stipulated By And Between the attorneys for the respective parties hereto that the original exhibits received in evidence upon the trial in the lower court, together with original exhibits marked for identification therein but not received in evi-

dence may be considered by the Court in the within appeal in their original form.

/s/ JAMES ARTHUR POWERS,
Of Attorneys for
Appellant-Defendant.
/s/ ALFRED H. CORBETT,
Of Attorneys for
Cross-Appellant-Plaintiff.

So Ordered:

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

/s/ WALTER L. POPE,
United States Circuit Judges.

[Endorsed]: Filed Oct. 20, 1949.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY ON APPEAL.

Appellant Booth-Kelly Lumber Company will rely upon the following points on appeal:

I.

1. That there was no breach of contract. Appellee's loss did not result through breach by Appellant of the contract. Any breach of the contract was fully known to Appellee and was waived by it.

2. (a) Appellee is estopped by its conduct from asserting that alleged breach of contract caused its

loss as a custom of operation had been developed between the parties covering the removal of any obstruction to track clearance upon request of Appellee.

(b) That the claimed breach of clearance was discovered by Appellee long prior to damage and therefore such damage was not caused by the claimed breach.

3. Appellee's loss resulted solely through an act or omission of Appellee and through no act or omission of Appellant.

4. That the judgment in the California Action is binding upon the parties as to the cause of Appellee's loss and the matter cannot be relitigated in the Federal Court.

5. No recovery can be allowed Appellee under the contract as it is an attempt to contract against its own negligence, the contract is void as against public policy under the laws of the State of Oregon as otherwise it would permit Appellee to recover for a loss it sustained through its own negligence.

6. (a) Negligence established in the California action, in action of employee against Appellee, constitutes the immediate proximate cause of the accident and injury, and Appellant's negligence, if any, is a mere remote cause; that matter is now res adjudicata.

(b) Appellee's liability to its injured workman did not arise out of the track agreement but rather

out of the master-servant relationship between Appellee and its injured employee under the Federal Employer's Liability Act.

7. There is no consideration for the contract and a total lacking of mutuality for the indemnity provision contained therein.

8. The contract has no application because the indemnity provision thereof, namely Paragraph VII, is applicable only when railroad (Appellee) is serving industry and at the time of the accident railroad (Appellee) was not serving industry.

/s/ JAMES ARTHUR POWERS,
Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 31, 1949.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH CROSS-APPELLANT WILL RELY ON APPEAL.

The points upon which cross-appellant intends to rely on this appeal are as follows:

1. The court erred in failing to enter judgment against appellant, for breach of the indemnity provisions of the spur track agreement, in the sum of $46,568.99, the amount of loss suffered by cross-appellant by reason of an act or omission of appel-

lant its agents or employees to an employee of cross-appellant while on the industrial spur; or, in the alternative.

The court erred in failing to enter judgment against appellant for breach of the indemnity provisions of the spur track agreement, in the sum of $23,284.49, one-half the amount of loss suffered by cross-appellant by reason of an act or omission of appellant, its agents or employees to an employee of cross-appellant while on the industrial spur.

2. The court erred in failing to award damages to cross-appellant in the sum of $46,568.99 for breach of the impaired clearance provisions of the industrial spur track agreement.

3. The court erred in failing to award recovery to cross-appellant in the sum of $46,568.99 independent of contract, because appellant's negligence in placing and leaving the wood cart within 42″ from the spur track was the active, direct, proximate and primary cause of the injury to cross-appellant's employee Powers, and of cross-appellant's resulting liability.

/s/ ALFRED H. CORBETT,
Of Attorneys for Cross-Appellant.

Service of copy acknowledged.

[Endorsed]: Filed Nov. 5, 1949.